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Products Liability And Tort Risk Distribution
In Government Contract Programs

by

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B.S. June 1963, U. S. Air Force Academy

J.D. May 1972, West Virginia University

A Thesis submitted to

The Faculty of

The National Law Center

of the George Washington University in partial satisfaction
of the requirements for the degree of Master of Laws

September 30, 1978

Thesis directed by

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Professor of Law

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FOREWORD

The author wishes to express his appreciation to Professor Ralph C. Nash, whose expertise and guidance were vital to the successful completion of this thesis, and to Dianne, Kimberly and Kristine, the author's wife and two daughters, whose assistance and encouragement also made this thesis possible.

At the present time the author is a Judge Advocate, Major, United States Air Force, currently assigned to the Office of the Staff Judge Advocate, Headquarters, Air Force Systems Command, Andrews Air Force Base, Maryland. The views expressed herein are solely those of the author and do not purport to reflect the position of the Department of the Air Force, Department of Defense, or any other agency of the United States Government.

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INTRODUCTION

Products liability law is relevant to government contract law because contractors with the federal government are subject to state products liability laws. Under state law, contractors may be subject to third party personal injury or property damage claims on negligence, warranty or strict products liability theories of recovery. The federal government, in contrast, can only be subjected to third party personal injury or property damage liability on a negligence theory under the Federal Tort Claims Act. This distinction is the source of considerable concern between federal agencies and government contractors. *→ cont on p. 2*

The contractors want government contract awards, and they want to be shielded from tort liability risk to third parties. Under normal circumstances, federal officials simply want to obtain needed products, construction or services under contracts that are most beneficial to the government. Generally, federal officials are not directly concerned about products liability because the federal government is accustomed to buying and using items, not manufacturing, supplying or selling such items. However, the federal government is often influenced by contractors to promulgate legislation, regulations, or contract clauses to protect contractors against third party liability, particularly in high-risk industries associated with air and space operations, commercial nuclear development and national

defense. Although the federal government is only indirectly concerned about products liability law, and that concern flows primarily through contractors with the government, the federal government concern nevertheless is or should be of paramount importance. Procurement contracts by civilian agencies and military departments involve many billions of tax dollars each year. The main concern, however, involves the high risk of personal injury or property damage to the public associated with these government programs.

cont'd
p. 1

→ The primary purpose of this thesis is to assess whether or not ordinary citizens (third parties) are adequately protected by existing laws. A secondary purpose is to assess whether or not contractors are adequately protected under present laws. To facilitate this assessment, Chapter I will document the rapid transition from negligence to strict products liability. Current products liability problems relating to manufacturing, insurance, and the tort-litigation system will also be discussed. Chapter II will consist of an overview of products liability development through the judicial system and state legislation. Chapter III will include a discussion of products liability law as it specifically relates to government supply and construction contracts, with emphasis on the effect of indemnity and contribution laws between the federal government and contractors. Chapter IV will address the impact of federal court decisions and federal legislation on products liability law. Emphasis will be placed on catastrophic accidents related to government programs. Finally, Chapter V will contain the conclusion and proposals for improvements in the overall system.

1. HISTORICAL BACKGROUND AND CURRENT PRODUCTS LIABILITY PROBLEMS

A. Rapid Transition From Negligence to Strict Liability

There is general agreement among legal scholars and jurists in the United States that the present era of strict liability in tort in the products liability field began with Justice Roger J. Traynor's famous concurring opinion in Escola v. Coca Cola Bottling Co.,¹ wherein he stated:

I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings...Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market....Emphasis supplied.

The rapid transition from negligence to strict liability, without any requirement to prove privity on contract or plead any breach of contractual warranty, was profoundly influenced and accelerated by Professor William L. Prosser's "assault upon the citadel" law review article written in 1960 while he was Dean of the University of California Law School:

If there is to be strict liability in tort, let there be strict liability in tort, declared outright without an illusory contract mask. Such strict liability is familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, and respondeat superior. There is nothing so shocking about it today that cannot be accepted and stand on its own feet in this new and additional field, provided always that public sentiment, public demand, and "public policy" have reached the point where the change is called for.³

Three years later, in 1963, Justice Traynor conclusively completed the transition from negligence to strict liability in

products liability law in the landmark case of Greenman v.
⁴
Yuba Power Products, Inc., a case involving head injuries to
the operator of a combination power tool that was being used
as a wood lathe. The pertinent language of Greenman provides,
inter alia, that:

A manufacturer is strictly liable in tort when
an article he places on the market, knowing that
it is to be used without inspection for defects,
proves to have a defect that causes injury to a human
being. Recognized first in the case of unwholesome
food products, such liability has now been extended
to a variety of other products that create as great
or greater hazards if defective.

Although in these cases strict liability has usually
been based on the theory of an express or implied
warranty running from the manufacturer to the
plaintiff, the abandonment of the requirement of a
contract between them, the recognition that the
liability is not assumed by agreement but imposed
by law, and the refusal to permit the manufacturer
to define the scope of its own responsibility for
defective products make clear that the liability is
not one governed by the law of contract warranties
but by the law of strict liability in tort.

...

To establish the manufacturer's liability it was
sufficient that plaintiff proved that he was injured
while using the Shopsmith in a way it was intended
to be used as a result of a defect in design and
manufacture of which plaintiff was not aware that
made the Shopsmith unsafe for its intended use.⁵

The next significant development in products liability law
was not long in coming. Justice Traynor and Dean Prosser were
among the more influential members of the American Law
Institute who formulated Section 402A of the Restatement
⁶
(Second) of Torts, dated 1965, which has served as a dramatic
impetus for adoption of strict products liability in a clear
majority of the various American jurisdictions. In the words
of Dean Prosser: "What has followed has been the most rapid

and altogether spectacular overturn of an established rule in the entire history of the law of torts."⁷

1. Historical Tort/Contract Confluence

Although strict liability in tort has become the majority rule in the United States in the products liability field, negligence and warranty are by no means dead as alternate theories of recovery. In fact, a negligence or warranty theory may sometimes be preferable to a strict liability theory, depending on the facts of a particular case. Since strict liability, warranty, and negligence all remain viable theories of recovery, a brief historical review of their development prior to Escola, Greenman, and Section 402A will keep the various theories in proper perspective.

Under early English law persons causing harm were held strictly accountable without a showing of fault,⁸ and this approach was continued when the civil action for compensatory damages developed.⁹ However, the requirement of fault began creeping into the law with the advent of industrial machinery in the 17th century.¹⁰ Apparently English jurists of that period felt the fault concept was needed to encourage industrial development, and they were no doubt also concerned about avoiding a "flood of litigation" involving what they perceived to be complex mechanical devices with which they had little familiarity.

Three landmark English cases decided in the first half of the 19th century had a profound impact on developing tort law. Butterfield v. Forrester,¹¹ decided in 1809, was the origin of the sometimes harsh rule of barring plaintiff's recovery in

a negligence action if the plaintiff is guilty of contributory negligence. The 1837 case of Vaughn v. Menlove¹² established the principle that the negligence standard to be applied to the defendant would be an objective rather than a subjective one, i.e., the question was one of whether the defendant had acted with a measure of caution such as a man of ordinary prudence would observe, not whether a particular defendant had acted honestly and bona fide to the best of his own judgment. In Winterbottom v. Wright,¹³ the leading English case in which privity of contract was held to be a condition precedent to liability grounded in negligence, Lord Abinger stated, "[t]here is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract."¹⁴

Ten years later, a New York court carved out an exception to the privity rule in the case of Thomas v. Winchester.¹⁵ In Thomas, the defendant manufacturer negligently mislabeled a poison as a harmless drug before selling it to a druggist, who resold it to the husband of the poisoned plaintiff. Plaintiff was allowed recovery because of the "inherently dangerous" nature of poisons, despite the lack of privity of contract between plaintiff and defendant.

¹⁶
Some commentators apparently feel that the 1865-1868 case of Rylands v. Fletcher¹⁷ has a proper place in the evolution of products liability law. However, that case, involving the escape of water from defendant's reservoir through unknown

mine shafts to plaintiff's property, where damage occurred,¹⁸ appears to stand more for a rule of absolute liability for potentially dangerous activities on land, rather than the type of strict liability that has come to be associated with defective products.

The next two cases of interest, MacPherson v. Buick,¹⁹ and Henningson v. Bloomfield Motors,²⁰ both decided in the United States, complete the historical review from the early English common-law up to the adoption of strict products liability by the Supreme Court of California in Greenman v. Yuba Power Products, Inc.²¹ The plaintiff in MacPherson was injured when defective wooden spokes on a wheel collapsed, causing plaintiff to be thrown from the car. Plaintiff had purchased the car from a retailer, who in turn had purchased it from the manufacturer. The issue was whether plaintiff could recover in a negligence action against the manufacturer despite lack of privity of contract with the manufacturer. Addressing this issue, Justice Cardozo stated:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger...If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.²²

In contrast, the Henningsen court was confronted with the issue of whether or not lack of privity of contract would bar recovery where the cause of action was based upon a warranty theory. The plaintiff in Henningsen had been given an automobile by her husband, who had purchased it from defendant. She was not in privity of contract with defendant. After being injured

while driving the car, she instituted suit against the dealer and manufacturer on a theory of implied warranty of merchantability. Speaking for the Supreme Court of New Jersey, Justice Francis stated:

But it cannot be overlooked that historically actions on warranties were in tort also, sounding in deceit. The contract theory gradually emerged, although the tort idea has continued to lurk in the background, making the warranty "a curious hybrid of tort and contract." Prosser 1955 § 89. An awareness of this evolution makes for ready acceptance of the relaxation of rigid concepts of privity when third persons, who in the reasonable contemplation of the parties to a warranty might be expected to use or consume the product sold, are injured by its unwholesome or defective state.

...
It is important to express the right of Mrs. Henningsen to maintain her action in terms of a general principle. To what extent may lack of privity be disregarded in suits on such warranties?...²¹ It is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain.²³

While MacPherson and Henningsen generally removed lack of privity of contract as a bar to a products liability action, regardless of whether the cause of action was based on negligence or warranty, strong doubts remained as to whether negligence or warranty would gain ascendancy as a mechanism for resolving products liability disputes. Although the courts have long been comfortably familiar with negligence actions, they have had more difficulty with warranty personal injury actions. In fact, the debate over whether the origin of warranty is in tort or contract continues to the present day.²⁴

The lack of precedent, and the lack of court familiarity with non-commercial personal injury warranty actions, no doubt played a significant role in bringing about the rapid products liability transition from negligence to strict liability in a majority of American jurisdictions. Additionally, as industry matured and potentially dangerous products greatly proliferated in the marketplace, courts began to reexamine the caveat emptor doctrine, and court after court concluded that manufacturers and other business entities in the distributive chain were better able to absorb the cost of injury caused by defective products. As a result of these policy considerations, the caveat emptor rule applicable to consumers has shifted to a caveat venditor rule applicable to manufacturers and sellers, and manufacturers and sellers have had to raise prices to pay for injuries and property damage losses through insurance or self-insurance funds. Generally, warranty actions involving non-commercial personal injury and property damage claims are encountered less frequently today than negligence and strict liability actions, primarily because of the notice and disclaimer barriers applicable to warranties under the Uniform Commercial Code. Moreover, privity of contract can still be a prerequisite to warranty recovery in some states, particularly in implied warranty actions. Practitioners should not forget that warranty remedies in recent history have basically pertained to contractual disputes, and warranty law is still somewhat murky in a personal injury tort context. Nonetheless, warranty actions, whether of the Uniform Commercial Code or common-law variety, continue to lurk in the background

as viable alternatives to negligence and strict liability actions.

B. Current Products Liability Problems

The products liability explosion of the last two decades has resulted in many problems in the manufacturing, insurance, and tort-litigation fields. Currently, the best and most comprehensive study of these various problems is undoubtedly the Final Report of the Interagency Task Force on Product Liability (Final Report) published in November of 1977.

Although products liability and insurance have generally been topics of state law, the federal government's interest, and subsequent studies leading to publication of the Final Report, arose in the fall of 1975. At that time, the Small Business Administration and numerous businesses contacted the Ford Administration and Congress indicating that a "crisis" had arisen in the area of products liability law. Specifically, they reported that the cost of products liability insurance had increased at an extraordinary rate in the 1974 to 1976 years, and that the number and size of claims had also increased at unprecedented rates. Professor Victor E. Swartz of the University of Cincinnati College of Law was selected as chairman of the working task force. Although the task force conducted several surveys and studies of its own, the main work was done by independent contractors who studied areas of concern relating to manufacturing, insurance, and the tort-litigation system.

1. Manufacturers

The manufacturing study indicated that some manufacturers do produce unreasonably unsafe products that suffer from defects

in construction. Plaintiffs have generally been less successful when alleging design defects, and the study showed that some manufacturers do not provide adequate instruction about the dangers associated with their products. It appears industry is generally becoming more interested in products liability prevention techniques. The task force recommended that government agencies most acquainted with product defects make information available to businesses that could use it, particularly in the areas of design research and quality control. Certain industries, such as the aircraft components industries, were found by the task force to already pay a good deal of attention to products liability prevention techniques.²⁹

2. Insurers

The Final Report was highly critical of the insurance industry and its rate-making procedures. Although the number of pending claims has increased, and the average amount of products liability judgments have increased during the 1970-1975 period, these increases did not appear to justify excessive insurance premium increases. A major problem associated with the cost of insurance premiums is that most insurers have not separated out product liability insurance from other general liability insurance. Additionally, insurers often lack sufficient data that would give them a reasonable basis to determine appropriate rates for a particular manufacturer.

According to findings of the task force, the increased cost of products liability insurance affected small businesses as much as 4 or 5 times more than large businesses. However, the cost of products liability insurance, on the average,

represented no more than 1% of sales, although it was substantially more or less for some industries.

The task force concluded that the absence of sufficient reliable data makes it impossible to confirm whether recent insurer premium increases are justified. However, the task force indicated that the burden of proof would appear to fall on the insurers to justify increases of 200, 300, or 400% in premiums where there is insufficient data based on claims experience to suggest that increases of this magnitude are proper. Moreover, the independent contractor assigned to study the insurance industry observed that some insurers appeared to engage in "panic pricing", and that products liability rates are "effectively uncontrolled".³⁰

3. Tort-Litigation System

According to the task force, insurers and many manufacturers argue that current products liability problems stem from the shift in the judicial system from negligence liability to the more liberal strict liability basis of recovery in tort actions against manufacturers. However, the task force legal study's sampling of appellate cases shows that defendants "won" in approximately 49% of the cases. The Cook County, Illinois, jury survey of products liability cases from 1970-1975 shows that the defendant won in approximately 65% of the cases. Significantly, insurance data suggests that 96% of products liability cases are settled before court verdict. Overall, 73% of bodily injury and 83% of property damage claims are settled without lawsuit, representing 7% and 33% respectively of payments made. Although available data indicates there is

an increase in the number of pending products liability claims and suits, and that payments to products liability claimants have increased somewhat, there is no hard data indicating that the number of claims and suits, and the amount of payments, has gotten out of control.

In the opinion of the task force, the main problem associated with the tort-litigation system is the uncertainty in the law caused by a difference in philosophy among the judges who are deciding the cases. Apparently, some judges see a products liability suit as a method of apportioning responsibility between the two sides to the dispute. Other judges, however, appear to be more inclined to view products cases as a compensation system for injured individuals, without regard to fault or respective responsibility.³¹

This difference of philosophical opinion has crystalized the major issue confronting the tort-litigation system today: Will legal liability to persons injured by products be governed by some form of comparative responsibility, or will such legal liability be governed by absolute liability or no fault concepts, disregarding any consideration of fault or responsibility arising out of the conduct of the plaintiff?

The remainder of this thesis will be devoted to a current overview of products liability law, leading to a study of products liability law applicable to government supply contracts and government construction contracts in the federal sector. Mechanisms for shifting tort risk distribution will be examined in both types of contracts. Finally, federal case decisions and statutes relating to federal tort liability

and catastrophic accidents in government programs will be analyzed in the context of products liability law.

Chapter I Footnotes

1. 24 Cal. 2d 453, 150 P.2d 436 (1944). In Escola, plaintiff's hand was severely injured when an unopened Coca Cola bottle "exploded" in her hand while she was performing duties as a waitress in a restaurant. The majority of the court allowed plaintiff to recover against Coca Cola based upon a negligence theory and application of the res ipsa loquitur doctrine.
2. 24 Cal. 2d 453, 150 P.2d 436 (1944). It is interesting to note that Justice Traynor used the term "absolute liability" in Escola, but shifted to "strict liability" in Greenman v. Yuba Power Products, Inc., cited infra note 4.
3. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1134 (1960).
4. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In Greenman, plaintiff brought an action for damages against the manufacturer of a Shopsmith, a combination power tool that could be used as a saw, a drill, or a wood lathe. Plaintiff suffered severe head injuries while using the Shopsmith as a lathe; he was struck on the forehead by a large piece of wood that flew out of the machine.
5. Id. Strict products liability was extended to retailers in California the following year in Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168 (1964).
6. Restatement (Second) of Torts § 402A (1965) (Hereinafter cited as Section 402A).
7. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 793 (1966).
8. Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv. L. Rev. 315 (1894).

9. Malone, Ruminations on the Role of Fault in the History of the Common Law of Torts, 31 La. L. Rev. 1 (1970); Woodbine, The Origins of the Action of Trespass, 33 Yale L.J. 799 (1924).
10. Malone, supra note 9; Prichard, Trespass, Case and the rule in Williams v. Holland, (1964) Camb. L. Rev. 234.
11. 103 Eng. Rptr. 926, 11 Eng. 60 (1809). In Butterfield, plaintiff was denied recovery as a matter of law because of his contributory negligence in riding his horse at excessive speed into an obstruction defendant had negligently left across the highway.
12. 3 Bing. (N.C.) 467, 132 Eng. Rep. 490 (C.P. 1837). In Vaughn, defendant exercised his bone fide best judgment in placing a hay rick near plaintiff's property, and despite warnings of the danger of fire, and advice to completely remove the rick, defendant made an aperture or chimney through the rick, eventually resulting in a fire and the destruction of plaintiff's barn, stables, and cottages. The holding of the case was that a man of ordinary prudence would not have proceeded in the same manner (objective test), and therefore defendant was liable despite the fact that he exercised his own bone fide best judgment (subjective test).
13. 152 Eng. Rep. 402 (Exch. Ch. 1842). In Winterbottom, plaintiff, the driver of a mail-coach, was rendered lame for life as a result of being thrown from his seat due to a latent defect in the coach, which caused it to give way and break down. Plaintiff contended defendant was liable

for his injuries because defendant negligently failed to carry out his contract to keep the coach in a "fit, proper, safe, and secure state", but the court denied recovery because defendant was in privity of contract with the Postmaster-General to keep the coach in good repair, not with plaintiff.

14. Id. at 405.
15. 6 N.Y. 397, 57 Am. Dec. 455 (1852).
16. See, e.g., Maleson, Negligence Is Dead But Its Doctrines Rule Us From The Grave: A Proposal to Limit Defendants' Responsibility In Strict Products Liability Actions Without Resort To Proximate Cause, 51 Temp. L.Q. 1, 4 (1978).
17. Fletcher v. Rylands, 3 H&C 774 (Exch. 1865), Fletcher v. Rylands, L.R. 1 Ex. 265 (1866), and Rylands v. Fletcher, L.R. 3 H.L. 330 (1868).
18. Justice Blackburn's language in L.R. 1 Ex. 265 that, "It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more." (Emphasis supplied). The final outcome of the case was that defendant Rylands was found liable on the basis of absolute liability, despite the fact that he was not guilty of negligence. It is noteworthy that Justice Blackburn used the term "absolute duty" as

opposed to "strict duty" or "strict liability". The terms "absolute liability" and "strict liability" have been used somewhat loosely over the years, sometimes even interchangeably. The term "absolute liability" appears to now embrace only the issues of causation and damages. See, e.g., Dalehite v. United States, 346 U.S. 15, 44-45 (1953). The term "strict liability", on the other hand, at least in the context of Section 402A products liability law, has come to embrace causation, damages, and the further element of "defect" in the product when it left defendant's control. The distinction between the meaning of these terms becomes more important as products liability law evolves. See, e.g., Edwards v. Sears Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) (distinguishing strict products liability and absolute liability).

19. 217 N.Y. 382, 111 N.E. 1050 (1916).
20. 32 N.J. 358, 161 A.2d 69 (1969).
21. See note 4 supra.
22. 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).
23. See note 20 supra.

According to Dean Prosser, Henningsen marked the final demise of the citadel of privity of contract as a condition precedent to maintaining a personal injury action arising out of products liability law. It is interesting to note that Henningsen was decided before New Jersey adopted the Uniform Commercial Code.

24. Compare Titus, The Restatement (Second) of Torts Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713 (1970) with Prosser, The Assault Upon the Citadel (Strict Liability

- to the Consumer), 69 Yale L.J. 1099, 1127 (1960). See also, Dickerson, Was Prosser's Folly Also Traynor's? Or Should the Judge's Monument Be Moved to a Firmer Site?, 2 Hofstra L. Rev. 469 (1974).
25. "As applied to personal injuries...it [the notice requirement] becomes a booby-trap for the unwary." See note 3 supra, at 1130.
26. Final Report, Interagency Task Force on Product Liability (Department of Commerce, November 1977). The Final Report is published by the National Technical Information Service (NTIS), 5285 Port Street Royal Road, Springfield, Virginia 22161. Copies may be ordered from NTIS at cost, and orders should refer to accession number PB-273-220.
27. Id. at I-3.
28. Professor Schwartz is also the co-author of Prosser, Wade and Schwartz, Cases and Materials on Torts (6th ed., Foundation Press, 1976), and author of Comparative Negligence (Allen Smith, 1974).
29. See generally note 26 supra, at I-24-26, and 20 ATLA L. Rep. 403-404 (November, 1977).
30. See generally note 26 supra, at I-21-24, and 20 ATLA L. Rep. 403-404 (November, 1977).
31. See generally note 26 supra, at I-26-29, and 20 ATLA L. Rep. 403-404 (November, 1977).

II. JUDICIAL AND STATE LEGISLATIVE DEVELOPMENT OF PRODUCTS
LIABILITY LAW

A. Strict Liability

1. Legal Standard-Restatement (Second) of Torts Section 402A

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Section 402A of the Restatement (Second) of Torts

provides as follows:

Section 402A. Special liability of seller of product for physical harm to user or consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

(2) The rule stated in subsection (1) applies although

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.³³ Emphasis supplied.

The real explosion in strict products liability law occurred after Section 402A was formulated by the American Law Institute in 1965. Probably no other Restatement pronouncement has ever received such widespread acceptance by the judicial system. Court after court "adopted" Section 402A, or a variant thereof, as though it were a legislative enactment. At the present time

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31 states have adopted Section 402A; nine states and the District of Columbia have adopted a doctrine of strict liability in tort

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not expressly based on 402A; three states have indicated acceptance of a rule of strict liability in tort either in

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dicta or by federal courts applying state law; and the remaining

seven states appear to have³⁷ neither adopted nor rejected strict products liability. It is noteworthy that eight of the above states that have adopted Section 402A have specifically³⁸ referred to negligence concepts.

The jurisdictions are split on one significant factor in strict products liability law. The majority has adopted the "defective condition unreasonably dangerous" language of³⁹ Section 402A, but three states have specifically rejected the "unreasonably dangerous" provision of Section 402A, and five⁴⁰ states other than California have followed the Greenman case law formulation of strict liability rather than Section 402A.

While absolute liability associated with abnormally⁴¹ dangerous or ultrahazardous activities involves only the central issues of causation and damages, strict products liability involves causation, damages, and a further requirement that the product was in a defective condition when it left defendant's control. This requirement - that plaintiff must prove the product was in a defective condition when it left defendant's possession - sometimes represents a very formidable burden for plaintiff. Expensive expert witnesses frequently have to be relied upon. Moreover, the majority of products cases depend upon circumstantial evidence for proof of defect. As stated by a federal court of appeals quoting from an Arizona Supreme Court opinion: "'There will seldom be a case based upon strict liability where a person will be able to testify from his personal knowledge that a particular product was sold in a defective condition. A requirement of direct evidence would⁴² effectively deny the theory of recovery.'"

A complete listing of the elements of pleading necessary to state a cause of action under Section 402A has been stated as follows:

1. The defendant sold a product.⁴³
2. The product was in a defective condition.
3. The defective condition was unreasonably dangerous to the user or consumer.⁴⁴
4. The seller was engaged in the business of selling said products.
5. Said product was expected to and did reach the user or consumer without substantial change in condition (that is, the defect existed at the time of sale).
6. Said defect was the proximate cause of the personal injuries or property damage incurred by the consumer or user.
7. Standard allegations as to jurisdiction and damages.⁴⁵

Although a plaintiff's burden under a strict products liability theory is generally less stringent than under a negligence theory, and the notice and disclaimer pitfalls of warranty actions are avoided, the cases have made it clear that strict products liability does not mean absolute liability, and manufacturers and sellers are not considered to be insurers of the safety of their products. A products liability plaintiff still has many formidable barriers to overcome if he is to win his lawsuit, even under a strict liability theory of recovery.

B. Proving Products Defective

Courts and commentators have encountered great difficulty defining the term "defective condition." One commentator observed that the requirement of defectiveness is important because it is common to both strict liability in tort and warranty, and as far as could be determined from the cases, the proof necessary to establish defectiveness on either theory is identical.⁴⁶ Two years after Greenman was decided, Justice

Traynor made the following comments on the definition of defect:

A defect may be variously defined; as yet no definition has been formulated that would resolve all cases. A defective product may be defined as one that fails to match the average quality of like products, and the manufacturer is then liable for injuries resulting from deviations from the norm. Thus, the lathe in Greenman v. Yuba Power Products, Inc.⁴⁷ was defective because it was not built with a proper fastening device as other lathes are. The automobile in Vandermark v. Ford Motor Co.⁴⁸ was defective because the brakes went out unexpectedly, as normal brakes do not. Although many questions still attend the problem of harm caused by smoking itself, courts have found the manufacturer liable for injury from a foreign object in the tobacco. If a normal sample of defendant's product would not have injured, but the peculiarities of the particular product did cause harm, the manufacturer is liable for injuries caused by this deviation.⁴⁹

Dean Prosser indicated that a product is to be regarded as defective if it is not safe for such a use that can be expected to be made of it and no warning is given.⁵⁰ Other prominent commentators, including Dean Wade and Dean Keeton, have discussed the elusive nature of the meaning of "defective condition."⁵¹ The Restatement provides that a defect is a condition not contemplated by the ultimate consumer which would be⁵² unreasonably dangerous to him. This definition, which generally has wide acceptance, is something less than satisfactory because it uses the expression "unreasonably dangerous" to define defect. Since Section 402A uses the full expression "defective condition unreasonably dangerous", it appears erroneous to define defect using the expression "unreasonably dangerous." No doubt much of the difficulty associated with attempting to formulate a satisfactory general definition of "defective condition" is caused by the fact that the expression has not been restricted to mere physical flaws in the condition of a product. There are

basically three types of product defects: manufacturing flaws, design defects, and inadequacy of warning.

1. Manufacturing Defects

Two classes of cases, those involving defective design and those involving inadequate warnings or directions, are sufficiently distinct in principle to warrant separate discussion. They are discussed below. This leaves a third class made up of defects that occur in manufacturing, processing, servicing, or even storing. Typically, cases involving manufacturing defects involve construction flaws or production defects that cause particular products to fail or perform in a manner less satisfactory than anticipated by both the user and manufacturer. Most of the early strict products liability actions were of this type, but the bulk of cases in this class of "defects" are now settled before trial, or lost at trial and not appealed.

Examples of manufacturing defects are: (1) a defective weld at the point of failure in the structural steel of a helicopter tail-section;⁵³ (2) a truck rear axle housing made of weak steel the grain size of which was greater than and in excess of the grain size of steel customarily used in left rear axle housings;⁵⁴ and (3) a decomposed mouse contained in a bottle of "Squirt".⁵⁵ The kinds of manufacturing defects are so obviously without number that only a few examples are needed for illustration.

2. Design Defects

Courts do not require specific designs; they simply require that the manufacturer rather than the injured plaintiff pay the cost when a product causes harm because of the manufacturer's

inadequate, unsafe design. Since manufacturers are commonly held to the standard of care of an expert with regard to products manufactured, it makes little difference to manufacturers if suit is brought against them under a strict liability theory or a negligence theory. It does make a difference where retailers or other non-manufacturing distributors are concerned, however, because they are normally not held to the standard of care of a manufacturing expert.⁵⁶

There is a significant overlap between strict liability and negligence theories in defective design cases. Generally, to determine whether a product is defectively designed, the risks presented by the product must be weighed against its utility. Dean Wade has proposed a comprehensive list of factors to be considered in defective design cases. His formulation has been adopted by the courts in Oregon,⁵⁷ Arizona,⁵⁸ and the Federal District Court for the Eastern District of Pennsylvania.⁵⁹ Under Dean Wade's test, the factors to be considered are:

- (1) The usefulness and desirability of the product - its utility to the user and to the public as a whole.
- (2) The safety aspects of the product - the likelihood that it will cause injury, and the probable seriousness of the injury.
- (3) The availability of a substitute product which would meet the same need and not be unsafe.
- (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
- (5) The user's ability to avoid danger by the exercise of care in the use of the product.
- (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

- (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.⁶⁰

Until recently, the sixth factor enumerated by Dean Wade - concerning the general public knowledge of the obvious dangerous condition of a product - barred recovery because the manufacturer of the product was considered to have no duty to guard against, or to warn of the dangers of, an obviously dangerous condition.⁶¹ Although some courts continue to adhere to this view, an increasing number of courts have repudiated its rigidity.⁶² In fact, the New York Court of Appeals has recently overruled Campo v. Scofield,⁶³ which had been the leading case in support of the "open and obvious" rule. As a result, the majority view now considers the open and obvious nature of the danger only one factor to be considered in the overall balancing test of defectiveness.

The "open and obvious" rule should be contrasted with the "commonly known danger" rule. Presumably, all courts would still bar liability where the danger was commonly known. For example, although a knife qualifies as an obviously dangerous instrumentality, a manufacturer need not guard against the commonly known danger a knife presents.⁶⁴ This type of risk is an inherent risk of the instrumentality, of a type all reasonable persons would be aware of in the course of using the product.

Dean Wade's fourth factor - the manufacturer's ability to eliminate the unsafe character of the product within practical and technological limits - relates to the "state-of-the-art" issue. That conformance with industry custom is not an absolute defense is virtually a unanimous view, with many courts concluding that an entire industry may have been at fault in not

improving its techniques. One state, Illinois, holds that
evidence of industry custom is immaterial in a strict liability
suit, and that the matter of whether a safer design was feasible
at the time that the product was marketed is also immaterial for
strict liability purposes. Whether or not this view will gain
wide acceptance remains to be seen. In any event, defective
design cases have been the subject of considerable controversy
and numerous recent law review articles, reflecting the significance and unsettled nature of this important branch of products liability law. Most commentators and judges would agree, however, that defective design cases are usually complex and expensive, and plaintiffs are successful less often in defective design cases than in cases involving assertions of manufacturing defects or inadequate warnings.

3. Defective Warnings and Directions

As products liability law has evolved, injured plaintiffs have alleged inadequate warnings as a basis of recovery in an ever increasing number of cases. Plaintiffs often allege defective design and inadequate warning in the same suit, and since manufacturers are held to the knowledge of experts in their respective fields, there is usually little practical difference in a strict liability warning case and a negligence warning case. Although there is no physical manufacturing or construction flaw involved in inadequate warning cases, the "defective condition" of the product consists of a lack of an adequate warning relative to dangers associated with the use of the product. A federal district judge recently observed that "almost every product liability case has a potential

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issue of failure to warn." Liability for failure to give
adequate warnings has been predicated on strict liability in
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tort, negligence, and even breach of warranty. Inadequacy of
warning has apparently become more popular with plaintiffs
because experts are needed less often to prove plaintiff's case,
and once an inadequate warning is established, plaintiff normally
needs to make no further showing of defect in the product or
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fault on the part of the manufacturer.

Courts have given considerable attention to the "unreasonably
dangerous" provision of Section 402A in defective warning cases.
Foreseeability of harm is another important issue. Both comment
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j and comment h of Section 402A apply foreseeability concepts to
warning cases. Additionally, most courts agree that the
seriousness of the harm that may result from the use of a product
is one of the most significant factors in warning cases.
Consequently, products involving a risk of serious potential
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harm, such as drugs, dynamite paraphernalia, and children's
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vaporizers will invariably involve a duty to warn, whereas a
case involving less potential for harm, such as one involving a
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hypersensitive user of hair products, will normally not involve
as strong a duty for the manufacturer to provide a full, accurate
warning.

Significantly, a manufacturer may be insulated from
liability where a design defect exists but an adequate warning
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has been given. In a related area, where the testing processes
of a manufacturer is considered inadequate, courts have usually
imposed liability on a failure to warn basis rather than on a
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basis of inadequate product testing. In Borel v. Fibreboard

Paper Products Corp., an important warning case involving asbestos dust injuries to plaintiff's decedent, the court stated at page 1089:

The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imported thereby. But even more importantly, a manufacturer has a duty to test and inspect his product. The extent of research and experiment must be commensurate with the dangers involved. A product must not be made available to the public without disclosure of those dangers that the application of reasonable foresight would reveal....[Emphasis supplied].

Moreover, the Court of Appeals for the Second Circuit has held that a manufacturer has a continuing duty to correct dangerous design defects (aircraft engine) when discovered after sale of the product, or if complete correction is not possible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger. ⁸³

One last issue merits discussion in failure to warn cases. What is the legal effect of a manufacturer complying with government statutes or regulations pertaining to warnings? The cases appear to indicate that compliance with statutory or regulatory requirements constitutes admissible evidence, but mere compliance standing alone will not relieve manufacturers ⁸⁴ of liability. In a 1968 Texas case a manufacturer of roach poison was held liable for the death of an infant despite compliance with Texas State Department of Health statutory requirements. Specifically, the court stated:

Neither the State nor the Federal Act purports to change the common law duty to warn. It merely authorizes the marketing of specified economic poisons if the statutes and the regulations promulgated are complied with. Neither Act purports

to deal with property rights. It makes it a crime to market such a product without complying with the Act. Failure to comply with the Act would be negligence per se. However, a mere compliance does not as a matter of law, in all cases, mean that the party is free from negligence. Whether there is negligence depends on the facts of each case. We are of the view that the statutes and regulations by the agencies merely set minimum standards. Compliance with the standards is evidence on the issue of negligence.⁸⁵ Emphasis supplied.

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The court in Jonescue v. Jewel Home Shopping Service, a 1973 Illinois case involving serious injuries to an infant who ingested a home cleaning agent, also concluded that compliance with a relevant statutory scheme (Federal Hazardous Substances Labeling Act, 15 U.S.C. § 1261 et seq.) is some evidence on the question of liability, but such compliance is not conclusive or controlling in defining defendant's common law liability for failure to warn.

C. Alternative Legal Theories

1. Express and Implied Warranties

As stated by Professor Leon Green in a 1976 law review article:

The duty of a seller under a warranty action is controlled by the sales warranty provisions of the Uniform Commercial Code...⁸⁷ In some cases of physical injury an action provided by the Uniform Commercial Code may also be maintained under § section 402A. In other cases of express warranties, an action may be maintained under Section 402B⁸⁸ of the Restatement.⁸⁹

a. Express Warranties

Section 2-313 of the Uniform Commercial Code provides as follows:

§ 2-313. Express Warranties by Affirmation, Promise Description, Sample

1. Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates

to the goods and becomes part of the basis of the bargain creates an express warranty affirmation or promise.

- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

2. It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Under current law, a material misrepresentation upon which a purchaser relies, even if innocent, is considered to be a breach of express warranty. The element of purchaser reliance is crucial to an express warranty cause of action. Additionally, representations made to the public at large, whether through media advertising, brochures, or labels, can be found to constitute express warranties. Although the representation has to be made before or at the time of the sale, the representation does not necessarily have to be in a written form accompanying the product; it can be a verbal representation of fact made at the time of the sale. In Wat Henry Pontiac Co. v. Bradley,⁹⁰ an interesting oral express warranty case where repair expenses involving the sale of a secondhand automobile were allowed, the court stated:

The rule is that to constitute an express warranty no particular form of words is necessary, and any affirmation of the quality or condition of the vehicle, not uttered as a matter of opinion or

belief, made by a seller at the time of sale for the purpose of assuring the buyer of the truth of the fact and inducing the buyer to make the purchase, if so received and relied on by the buyer, is an express warranty.⁹¹

In another significant express warranty case, Huebert v. Federal Pacific Electric Co.,⁹² the Supreme Court of Kansas held that an injured plaintiff will be allowed recovery where a manufacturer has made assertions and assumed responsibility which extends beyond liability for defects. The court stated:

All express warranties must be reasonably construed taking into consideration the nature of the product the situation of the parties, and surrounding circumstances. However, defects in the product may be immaterial if the manufacturer warrants that a product will perform in a certain manner and the product fails to perform in that manner. Defects may be material in proving breach of an express warranty, but the approach to liability is the failure of the product to operate or perform in the manner warranted by the manufacturer.

b. Implied Warranties

An implied warranty theory of recovery will generally be based on either an implied warranty of merchantability or an implied warranty of fitness for a particular purpose. Section 2-314 of the Uniform Commercial Code provides as follows:

§ 2-314 Implied Warranty: Merchantability: Usage of Trade

1. Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
2. Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and

- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

3. Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

An example of recovery under an implied warranty of merchantability theory is McCabe v. L. K. Liggett Drug Co.,⁹³ a 1953 Massachusetts case where a coffee maker blew up in plaintiff purchaser's face despite the fact she was using the coffee maker in accordance with instructions. She had given timely notice of breach of warranty to defendant retailer.

Section 2-315 of the Uniform Commercial Code provides:

§ 2-315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

A purchaser prevailed in Northern Plumbing Supply, Inc. v. Gates,⁹⁴ a 1972 North Dakota case involving an implied warranty of fitness for a particular purpose, because seller provided purchaser with a pipe of 0.116 inch thickness instead of 0.133 inch thickness

as requested by the purchaser. Significantly, the purchaser had left a sample of the 0.133 inch pipe with seller, and the seller knew the pipe was to be used for farming harrow attachments. The court was of the opinion that the seller knew, or should have known, as an expert in the pipe field, that the 0.116 inch pipe was too thin and therefore unfit for purchaser's particular purpose in ordering the pipe. The court further found that the purchaser had relied on the seller to furnish the type of pipe needed for his operations.

Although implied warranties have formed the basis of recovery in numerous cases, an express warranty theory, where applicable, is generally more favorable from an injured purchaser's point-of-view. An express warranty involves a self-imposed standard of liability, which may go beyond the minimum legal liability standard. Since an express warranty is communicated directly to the consumer, there is no issue of privity of contract. Finally, the Uniform Commercial Code and case law make it more difficult for sellers to disclaim express warranties.

c. Disclaimers

Under the Uniform Commercial Code both express and implied warranties may be disclaimed, if done in a conspicuous and conscionable manner. Section 2-316 of the Uniform Commercial Code provides:

...

2. Subject to subsection (3.), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.

Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'

3. Notwithstanding subsection (2.)

- (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyers attention to the exclusion of warranties and makes plain that there is no implied warranty; and
- (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
- (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

4. Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).⁹⁵

Generally, fine print is fatal to a disclaimer, as well as print which is the same size and color as other provisions.⁹⁶ Moreover, it is nearly impossible to disclaim an express warranty because such a purported disclaimer would be inconsistent with the express warranty language.⁹⁷

The disclaimer language of Section 2-316 must be interpreted in conjunction with the damages limitation language of Section 2-719 and the unconscionability language of Section 2-302. Pertinent language of the latter two provisions provides:

§ 2-719.

3. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.
Limitation of consequential damages for injury

to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.⁹⁸
/Emphasis supplied/.

§ 2-302 Comment 1

The basic test [of unconscionability] is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.⁹⁹

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In Collins v. Uniroyal, Inc., a 1973 New Jersey express warranty case, defendant tire company included language in its Guarantee (Warranty) purportedly disclaiming consequential damages, limiting its liability to repair or replacement of the tires. Plaintiff's intestate was killed when one of the tires failed. The court allowed recovery, observing that a purported limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. The court was of the opinion there was no evidence in the record to overcome the clear unconscionability of disclaiming consequential damages and attempting to limit the manufacturer's liability to the repair or replacement of the tire. Additionally, plaintiff was not required to prove the technical cause of the tire's failure, or a specific identifiable defect in the tire, because plaintiff sued under an express warranty theory.

Although the courts and commentators have almost universally accepted the assumption that all attempts to disclaim or otherwise limit strict products liability would be ineffective, one commentator contends the courts cannot agree and that strict

tort disclaimers are possible.¹⁰¹ Exculpatory clauses and hold harmless agreements, primarily applicable to negligence liability,¹⁰² have also been subjects of law review interest. Commentators have also written extensively on commercial disclaimers and warranties,¹⁰³ and on warranties and disclaimers applicable to federal government contracts.¹⁰⁴

d. Federal Warranty Legislation

The Uniform Commercial Code has generally served as an effective body of law between experienced sellers and buyers in a commercial context, but it has been the subject of considerable criticism relative to ordinary consumers. Understandably, laymen have experienced great difficulty understanding the warranty and disclaimer language of the Uniform Commercial Code, and without legal assistance, ordinary consumers all too often do not even give sellers timely notice of losses as required by the Code.

In 1975 Congress enacted the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act (Magnuson-Moss Warranty Act)¹⁰⁵ in response to consumer criticism of the Uniform Commercial Code. The primary purposes of the Act are to provide minimum disclosure standards for written consumer product warranties, and to define minimum federal content standards for such warranties. Disclosure requirements will hopefully lead to enhanced competition, while minimum federal content standards are designed to eliminate or reduce deception and misleading information. The Act does not require that a consumer product or any of its components be warranted,¹⁰⁶ but any written warranty, if made, shall fully and conspicuously

disclose in simple and readily understandable language the
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terms and conditions of such warranty.

The most significant language of the Act appears in
Section 2304:

(a) In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty-

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 108(b), such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product or a component thereof contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be)...108

(b)(1) In fulfilling the duties under subsection (a) respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty...109 [Emphasis supplied].

Although the Magnuson-Moss Warranty Act contains some consumer-oriented features, the Act clearly does not prohibit disclaimers or dispense with notice requirements. As a result, anticipated consumer gains over the most objectionable provisions of the Uniform Commercial Code may prove to be largely illusory. The Act does give consumers limited access to federal courts and the possibility of access to informal dispute
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settlement mechanisms. Moreover, in appropriate cases consumers can recover costs and expenses, including attorney's fees.

against noncomplying suppliers, warrantors, or service
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contractors. The Act does not take away any previously
existing consumer remedies. It was not intended to affect
purely commercial transactions.

2. Negligence

Everyone knows that a plaintiff must establish duty, breach of duty, causation, and damages to recover in any negligence action. There is no need to discuss those negligence concepts here. However, products liability practitioners should not lose sight of the fact that negligence remains a viable alternate legal theory to strict liability and warranty. In fact, with the exception of express warranty cases, negligence cases can have more jury appeal from a plaintiff's point-of-view than strict liability or implied warranty actions. If a jury feels a defendant has been negligent, or has failed to live up to express warranty representations, the associated adverse reaction normally leads to higher jury awards.

The most significant development in negligence law in the last fifteen years has been the shifting trend from contributory negligence to comparative negligence. The all-or-nothing nature of the contributory negligence defense often produced harsh results. Plaintiffs who suffered serious injuries but were guilty of slight contributory negligence recovered nothing from grossly negligent defendants. The equitable doctrine of comparative negligence was conceived as a means of correcting this inequity in the law, and its rapid acceptance in the United States has proceeded almost as rapidly as the strict products liability explosion.

The basic concept of comparative negligence is that the negligence of the plaintiff will be compared to the negligence of the defendant, and the plaintiff's recovery will be reduced by his percentage of negligence in causing the incident. In attempting to effectuate this policy, however, the courts and legislatures have developed three different types of comparative negligence doctrines: the pure form, the modified form, and the slight and gross form. The modified form has been further broken down into the 50% form and the 49% form.

Under the pure form a plaintiff is allowed recovery regardless of the percentage of negligence attributable to him, unless his negligence reaches 100%, but his recovery is reduced by the percentage of negligence attributable to him.. Under a modified 50% type of comparative negligence, plaintiff will be able to recover if the percentage of his own negligence is "not greater than" defendant's negligence (50% or less), whereas in a modified 49% type of comparative negligence, plaintiff will be able to recover if the percentage of his negligence is "less than" defendant's negligence (49% or less). Of course, plaintiff's recovery is reduced by the percentage of his negligence under either modified form variation. In a slight and gross comparative negligence jurisdiction a plaintiff can recover if a determination is made that his negligence, if any, is slight compared to gross negligence on the part of defendant. If plaintiff satisfies this test, the percentage of his negligence is then determined and his recovery is reduced by that percentage. If plaintiff's negligence exceeds slight negligence under the slight and gross variety, he recovers

nothing. The simple chart below will help illustrate the differences in result of these four forms of comparative negligence.¹¹² To date, at least 32 states currently apply one form or another of comparative negligence in lieu of a contributory negligence defense in negligence actions.¹¹³

One of the most interesting and controversial developments in the law, discussed below under "defenses", is whether comparative negligence concepts should be applied to strict products liability actions.

D. Defenses

In a cause of action based upon negligence, assumption of risk by the plaintiff is still a viable affirmative defense in most states. Comparative negligence is a defense concept in those states which have adopted one of the forms of comparative negligence law.¹¹⁴ In those states which have not adopted comparative negligence or comparative fault, the old common-law contributory negligence rule is still available as an affirmative defense barring recovery.

Possible defenses applicable to warranty actions include lack of notice,¹¹⁵ disclaimers,¹¹⁶ nonreliance and assumption of risk.¹¹⁷ Contributory negligence has generally not been considered a defense in warranty actions,¹¹⁸ but that rule appears to be changing in some jurisdictions that apply comparative negligence or comparative fault laws.¹¹⁹¹²⁰

Strict products liability dispensed with defenses based upon notice, disclaimers and privity of contract. Comment n to Section 402A provides that contributory negligence - at least of a variety specified therein - is not a defense, but

contributory negligence amounting to what is commonly known as assumption of risk does constitute a defense. Specifically, Comment n to Section 402A provides:

n. Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see Sec. 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.¹²¹ [Emphasis supplied].

The above language referring to traditional contributory negligence is understandable so far as it goes, but the legal effect of other types of contributory negligence in strict liability actions remains uncertain. Two states,¹²² Wisconsin and New Hampshire,¹²³ have recognized the applicability of contributory negligence as a defense in strict liability actions; however, the impact of those two decisions was softened by the application of comparative negligence statutes.

There is a split of authority as to what knowledge on the part of plaintiff is required to establish the affirmative defense of assumption of risk in strict liability cases. Although there is general agreement that plaintiff must have actual,¹²⁴ subjective knowledge of the particular risk, there is disagreement as to whether or not plaintiff must have knowledge of the specific product defect that threatens harm. In Perkebile v. Erantly Helicopter Corporation,¹²⁵ the court held the plaintiff

could only be precluded from recovery if he knew of the specific helicopter defect and voluntarily proceeded to use the helicopter with knowledge of the danger caused by the defect.¹²⁶ In contrast, a Texas court held in Heil Company v. Grant,¹²⁶ that the knowledge requirement is satisfied by a generalized knowledge of the dangers to be encountered, such as the generalized knowledge of the dangers associated with working under the bed of a dump truck. The court did not require knowledge of the specific design defect that caused the truck bed to fall.

There is also disagreement as to whether or not the "reasonableness" criterion, as stated in Comment n, is a proper consideration in weighing assumption of risk defenses. The Oregon Supreme Court¹²⁷ approved reasonableness as a proper criterion when judging plaintiff's subjective decision to voluntarily encounter a known risk,¹²⁸ but a Texas court specifically rejected this approach.

Misuse of the product is another significant defense in strict products liability cases. Comment h to Section 402A recognizes that an abnormal use or misuse of a product may constitute a complete defense. Misuse by the plaintiff may indicate absence of a defect, or lack of causation, or both. For example, in one case plaintiff failed to prove a grinding wheel was defective where plaintiff disregarded a warning not to use the grinding wheel above certain speeds.¹²⁹ In another case, alteration of a ladder constituted misuse: plaintiff was denied recovery because he nailed wooden strips to the bottom of the ladder, which was considered to be the legal cause of the accident.¹³⁰ Foreseeability is an important issue

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in misuse defense cases. In Schuh v. Fox River Tractor Company, a 1974 Wisconsin decision, the court indicated foreseeable misuse of a product by a plaintiff would limit his recovery under the comparative negligence statute, while unforeseeable misuse would bar recovery completely.

One of the most controversial issues in strict products liability today is whether or not comparative negligence or comparative fault concepts should be applied in strict liability cases. As previously indicated, a majority of the states have now adopted both strict products liability and comparative negligence. Arkansas is the only state so far that has enacted both strict products liability and comparative fault legislation.

What is the relevance of plaintiff's negligence or fault in a strict liability case? Of the states surveyed with both strict liability and comparative negligence laws, a clear majority are applying comparative negligence concepts to strict liability actions. Beginning with Dippel v. Sciano,¹³² a 1967 Wisconsin case, the court indicated by way of dicta that no distinction would be made between conventional contributory negligence and assumption of risk when applying Wisconsin's comparative negligence statute in strict liability suits. The Wisconsin court reasoned that strict products liability was merely negligence per se, to which plaintiff's negligence could be compared. This same reasoning was applied in Hagenbuch v. Snap-On-Tools Corporation,¹³³ a 1972 federal district court case applying New Hampshire law. In Hagenbuch, a metal chip flew from a hammer and injured plaintiff's eye; he had continued using the hammer despite a prior injury to a finger by a different

metal fragment from the same hammer. Florida also followed the negligence per se reasoning in West v. Caterpillar Tractor Company,¹³⁴ a 1976 case involving a Caterpillar grader that backed over a pedestrian. The West court agreed with Comment n of the Restatement, that plaintiff's negligent failure to discover a product defect would not constitute a defense, but went on to say that lack of ordinary due care by plaintiff would decrease plaintiff's recovery when applying Florida's comparative negligence law in strict liability actions.¹³⁵

In Butand v. Suburban Marine and Sporting Goods, Inc.,¹³⁶ the Supreme Court of Alaska was confronted with a case involving an apparent defective snowmobile and an apparent negligent plaintiff. A drive belt broke on the snowmobile which caused an allegedly defective guard to shatter and injure plaintiff's eyes. Defendant alleged that plaintiff had failed to properly maintain the snowmobile, and that plaintiff had been racing the snowmobile, which was not designed for racing, at the time of his injury. Alaska adopted pure comparative negligence before the case was to be retried, and the court stated it found it:

[U]nnecessary to conceptualize the theory of the action which strict liability creates in order for us to apply comparative negligence principles to strict products liability cases which result in personal injuries... Although it is theoretically difficult for the legal purist to balance the seller's strict liability against the user's negligence, this problem is more apparent than real.¹³⁷

The Supreme Court of Texas was confronted with a similar issue in General Motors Corporation v. Hopkins.¹³⁸ In that case plaintiff had removed and reinstalled an allegedly defective carburetor in his truck, and was subsequently injured in an accident apparently caused by a stuck carburetor. The trial

jury found for plaintiff on a strict liability theory, but also found that plaintiff's action constituted a material misuse of the vehicle. On appeal, the Supreme Court of Texas affirmed the judgment, without reduction for plaintiff's negligence, because defendant manufacturer had failed to plead misuse of the product as a proximate cause of plaintiff's injuries. Nonetheless, the court provided the following guidance with regard to future properly pled cases:

The defense in a products liability case, where both defect and misuse contribute to cause of damaging event will limit the plaintiff's recovery to that portion of its damage equal to the percentage of the cause contributed by the product defect.¹³⁹

A significant procedural point in Hopkins concerns the form of comparative negligence to be applied in future strict liability cases. The Texas Supreme Court acknowledged the 50% form of modified comparative negligence applicable to negligence actions by statute, but by judicial decision stated a pure form of comparative negligence would be applied in strict liability cases.¹⁴⁰

A growing number of jurisdictions have indicated they will apply comparative negligence concepts in strict liability cases.¹⁴¹ The issue remains undecided in California. Although discussed, the California Supreme Court did not feel the issue was properly before them in Horn v. General Motors Corporation.¹⁴² That case was tried before California adopted comparative negligence in Li v. Yellow Cab Company.¹⁴³

Only one case was discovered that discussed the applicability of comparative negligence to a warranty cause of action. In Chapman v. Brown,¹⁴⁴ plaintiff was severely burned by a rapidly

burning hula skirt that had caught fire from unknown causes. The United States District Court for the District of Hawaii was of the opinion the courts of Hawaii would apply comparative negligence in breach of implied warranty cases.

Courts in at least two jurisdictions have refused to apply comparative negligence in strict liability cases. In a 1976 case, ¹⁴⁵Kinard v. Coats, the Colorado Court of Appeals refused to apply comparative negligence to a strict products liability action under Section 402A. Plaintiff, who held an engineering degree, was injured when a bumper hydraulic jack suddenly propelled upward, knocking the vehicle off a floor hoist and injuring plaintiff. The jack had previously been given several bursts of air by plaintiff with no apparent effect. The court ¹⁴⁶acknowledged Dippel v. Sciano, but held that the better reasoned position is that comparative negligence does not apply to products liability actions under Section 402A. The court stated:

What defendant proposes here is that we inject negligence concepts in an area of liability which rests on totally different policy considerations.¹⁴⁷

In a similar holding, the Supreme Court of Oklahoma stated that the Oklahoma comparative negligence statute has no application to manufacturer's (strict) products liability actions because the comparative negligence statute is specifically limited to ¹⁴⁸negligence actions.

Not unexpectedly, there is a difference of opinion among commentators as to whether or not comparative negligence should apply in strict products liability actions. The defense bar has been very active writing articles in support of comparative

negligence application. Unfortunately, the plaintiff's bar has not expressed its views as diligently in the law reviews. Professor Harvey Levine of the University of San Diego School of Law has written an excellent, well-reasoned law review article¹⁵⁰ opposing application of comparative negligence and comparative fault in strict products liability actions. He argues persuasively that strict products liability is a cause of action that proceeds irrespective of negligence or fault, and it would therefore be illogical to ask a jury to compare defendant's non-fault with plaintiff's fault. That would be like comparing apples to oranges.

Professor John Wade is of the opinion strict products liability can be characterized as "legal fault", thereby enabling juries to compare defendant's legal fault with plaintiff's fault of the morally reprehensible type.¹⁵¹ He notes that strict products liability and comparative negligence developed separately, and that the relationship between the two doctrines has given the courts great difficulty. In his view, these difficulties could be overcome if the states would adopt the new Uniform Comparative Fault Act¹⁵² recently approved by the National Conference of Commissioners on Uniform State Laws. The Act is characterized as a pure form of comparative fault; it compares all forms of fault on the part of plaintiff with defendant's "legal fault," whether based on negligence, warranty or strict liability, and diminishes plaintiff's recovery¹⁵³ accordingly.

Will the Uniform Comparative Fault Act serve as a rational mechanism for the mixing of oil (defendant's strict products

liability) and water (plaintiff's culpable conduct)? There is no question that the Act contains some of the most innovative and advanced features in products liability law. It is brief and well-written. Most importantly, the Act expressly deals with the relationship between plaintiff's moral fault and defendant's legal fault, regardless of whether defendant's legal fault is based on negligence, warranty, or strict liability. In contrast, existing comparative negligence laws embrace only negligence actions. Nonetheless, the Act is almost certain to evoke considerable opposition.

The first criticism that can be made of the Act is that it really does not solve the existing products liability semantic snarl. Although lawyers could work with an abstract "legal fault" concept, juries in actual cases would undoubtedly encounter great difficulty attempting to compare defendant's "legal fault" with plaintiff's fault of the morally reprehensible type. The meaning of plaintiff's type of fault is common knowledge, but it is very doubtful that juries could understand the meaning of "legal fault" as applied to the defendant. No doubt, many lawyers will also have difficulty with the comparative fault terminology. Comment a to Section 402A provides: "The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product." If the seller can be found liable regardless of fault, the use of an expression such as "legal fault" is less than satisfactory. However, this problem may be more imagined than real. The semantic difficulty could be resolved simply by changing the name of the Act to the Uniform Comparative Responsibility Act.

Both juries and attorneys should be able to understand and accept this terminology. Although only a change in semantics, a jury instruction to compare defendant's responsibility with plaintiff's responsibility would at least have the appearance of comparing oranges to oranges.

The more difficult policy question is whether or not plaintiff's conduct should be considered as a basis for diminishing recovery in causes of action based on strict liability or warranty. This question was not answered by Greenman or Section 402A. Moreover, the vast majority of comparative negligence laws, most of which were enacted by state legislatures rather than judicially pronounced, do not answer this question. The courts that have applied comparative negligence laws to strict liability and warranty actions, as discussed above, may have violated basic constitutional provisions, such as due process and separation of powers, at least in those cases where comparative negligence statutes have been applied in strict liability and warranty cases. The comparative negligence statutes generally discuss applicability to negligence actions only. Consequently, it appears a state supreme court has two choices if it is to act within constitutional bounds: (1) wait for the state legislature to enact a comparative responsibility law, or (2) judicially pronounce a comparative responsibility law separate and distinct from any existing comparative negligence law. Some courts, such as the Colorado court in Kinard v. Coats,¹⁵⁴ apparently feel this is a proper sphere of the state legislature and appear to have opted for the first choice. Other courts, such as the Texas Supreme Court in General Motors

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Corporation v. Hopkins, appear to have opted for the second choice.

The question of whether or not a plaintiff's conduct should be considered as a basis for diminishing recovery in strict liability and warranty actions is a difficult question, the answer to which reasonable minds might differ. The law in this area is still evolving rapidly; it will be some time yet before it reaches equilibrium. Based upon past experience, some states will probably adopt comparative responsibility by statute, some states by judicial decision, and some states may not adopt comparative responsibility at all. The question may eventually become the subject matter of federal legislative action.

Although the defense bar can be expected to be for stringent comparative responsibility laws,¹⁵⁶ and the plaintiff's bar against, this writer "can't help" but favor a pure form of comparative responsibility law. The harsh contributory negligence rule of¹⁵⁷ Eutterfield v. Forrester, served as a complete bar to recovery by plaintiffs for far too many years. A strict liability or warranty rule today that did not take into account plaintiff's culpable conduct would result in almost as harsh a rule against sellers, at least in principle. Although sellers can raise prices to pay products liability damages or insurance premiums, it is not fair to pass on the costs of plaintiff's culpable conduct to the general public. The plaintiff should be held responsible for his or her culpable conduct; he or she alone should pay the associated cost. One of the problems associated with diminishing plaintiff's recovery by the percentage of his or her culpable conduct has been a semantic difficulty. That

problem can be solved by including negligence and fault within the broader heading of responsibility. The other major problem is really one of form rather than substance. Justice has been served in those cases discussed above that allowed plaintiff's strict liability or warranty recovery to be diminished in proportion to plaintiff's culpability in causing the accident; those cases have only been wrong as a matter of form. Legal form has not had time to catch up with legal substance. The present situation is like a mirror image of the early English common-law days when plaintiffs with justifiable claims could not recover unless they could fit their cases into one of the approved "pigeonhole" forms of action such as trespass, case, or assumpsit. It is now the defendant who is trying to find an approved "pigeonhole" for a reduction in damages.

A comparative responsibility law would promote fairness, certainty and uniformity in products liability law. Since all parties would be held accountable, manufacturers should be able to produce products at lower prices; insurers should be able to offer products liability insurance at lower, more reasonable rates; and the tort-litigation system should be able to pull itself out of its present state of doctrinal havoc and function in a more efficient and balanced manner.

E. Choice of Law

Although a separate, complex subject in itself, the area of choice of law (conflict of laws) should be briefly discussed in this chapter. Choice of law issues arise all too often in products liability disputes. Component parts of a product may be designed and built in different states. The end product may

be assembled in another state. The accident causing personal injury or property damage may occur in still a different state, perhaps to a plaintiff who is domiciled in yet another state. The list of possible complicating factors is almost endless, and the courts are left with the burdensome task of deciding what state law applies to what dispute.

The lex loci delicti rule was uniformly accepted throughout the United States until the middle of the twentieth century. Under that rule the law of the place of first harmful impact - where the technical completion of the tort was deemed to have occurred - was generally applied without question. Although still the law in some states, the mechanical lex loci delicti rule resulted in unwise choices of bad law in some cases.

In 1963, the New York Court of Appeals made a clean break with the lex loci delicti rule in Babcock v. Jackson.¹⁵⁸ In Babcock the court adopted a "center of gravity" or "dominant contacts" test under which the law to be applied to a disputed issue was controlled by the law of the state which had the most significant relation to the facts bearing upon that issue. Some states still follow the "center of gravity" test, but New York¹⁵⁹ has now drifted to a new "governmental interest" approach to choice of law.

In the view of Professor Robert A. Leflar, a recognized authority in this field, the trend has now shifted to a comprehensive and more realistic "choice-influencing considerations" test. The five main considerations of this test are:

- (1) Predictability of results (less important in torts than in contract, property, and other planned transactions);

- (2) Maintenance of interstate and international order (seldom threatened in tort cases);
- (3) Simplification of the judicial task (ordinarily requiring use of the forum's own procedural rules);
- (4) Advancement of the forum's governmental interests (this was the central feature of the original Brainerd Currie Thesis though it has now been replaced in California and elsewhere by a "comparison of interests");
- (5) Preference for what the court regards as the "better rule" of law (this is the most controversial of the considerations).¹⁶⁰

Several leading decisions have recently applied the choice-¹⁶¹ influencing considerations to tort problems.

Although the "choice-influencing considerations" approach appears to be gaining increasing favor there is a tendency among states that have moved away from the lex loci delicti rule to run the modern conflict of laws approaches together. Thus, practitioners must fully explore the facts of each particular case, and carefully consider those facts in relation to the choice of law rules of all affected states.

F. Economic Losses Under State Law

Before leaving an overview discussion of products liability law, one further area of interest merits consideration. What theories of recovery apply to economic loss situations where there has been no personal injury or property loss sustained? The cases appear to unanimously agree that negligence, warranty, and strict products liability are all viable theories of recovery regarding personal injuries and property losses arising out of traumatic accidents. There is a split of authority, however, if plaintiff does not suffer those types of losses, but instead suffers direct economic losses such as loss of the

bargain or cost of repairs or replacement, or suffers indirect economic losses such as loss of profits.

The two leading cases in this area of interest are Santor v. A and M. Karagheusian, Inc.,¹⁶² and Seely v. White Motor Company.¹⁶³

In Santor, a 1965 decision by the Supreme Court of New Jersey, plaintiff consumer was allowed to recover the value of home carpeting against defendant manufacturer on a theory of implied warranty of reasonable fitness, despite lack of privity of contract. The carpeting was defective in that it contained unusual lines in it. Significantly, the court went on to approve application of strict products liability even though there were no personal injuries or property losses suffered as a result of a traumatic accident. The Court stated:

As we have indicated, the strict liability in tort formulation of the nature of the manufacturer's burden to expected consumers of his product represents a sound solution to an ever-growing problem, and we accept it as applicable in this jurisdiction. And, although the doctrine has been applied principally in connection with personal injuries sustained by expected users from products which are dangerous when defective, we reiterate our agreement...that the responsibility of the maker should be no different where damage to the article sold or to other property of the consumer is involved. In this era of complex marketing practices and assembly line manufacturing conditions, restrictive notions of privity of contract between manufacturer and consumer must be put aside and the realistic view of strict tort liability adopted...¹⁶⁴

In Seely, a 1965 decision by the Supreme Court of California, plaintiff purchased a truck for use in his business of heavy duty hauling. For several months the truck suffered from a bounding action known as "galloping", and eventually the brakes allegedly failed, causing the truck to overturn. Plaintiff was not personally injured in the accident but truck repairs cost

\$5,466.09. Thereafter, after having paid \$11,659.44 toward the purchase price of \$22,041.76, plaintiff served notice that he would make no further payments. The truck was then repossessed by the retailer who resold it for \$13,000.00. The trial court awarded damages against defendant manufacturer for lost profits and for money paid on the purchase price of the truck.

The Supreme Court of California approved these damages on an express warranty theory. The rationale of the court was that defendant breached its express warranty to repair or replace parts, associated with the "galloping" condition, and hence plaintiff was entitled to recover damages for money paid and lost profits. Damages for the cost of truck repairs resulting from the accident were denied because the trial court found that plaintiff had not proved that the "galloping" had caused the accident, and plaintiff apparently did not prove that the brakes were defective. If plaintiff had been able to prove the accident was caused by defective brakes, he should have been able to recover repair costs under the Greenman strict liability doctrine.

Although Seely was decided on express warranty grounds, a majority of the court felt compelled to discuss strict liability concepts in relation to economic losses, a discussion that was severely criticized as mere dicta by Justice Peters. The majority acknowledged the New Jersey Santor holding and went on to say:

A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a

manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone. (Wyatt v. Cadillac Motor Car Division, 145 Cal. App. 2d 423, 426, 302 P.2d 665, disapproved on other grounds in Sabella v. Wisler, 59 Cal. 2d 21, 31, 27 Cal. Rptr. 689, 377 P.2d 889; Trans World Airlines v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284, 290.) The Restatement of Torts similarly limits strict liability to physical harm to person or property....¹⁶⁵

In a thought-provoking concurring and dissenting opinion, Justice Peters condemned the unnecessary discussion of strict liability as dicta, but since the majority discussed the doctrine he wanted to make it clear he agreed with the rationale of the Santor court regarding economic losses. In his view, there are justifiable reasons for applying restrictive statutory warranty provisions to commercial parties, but "ordinary consumers" should be allowed to recover under more liberal strict liability rules.

There appears to be sound reason for limiting commercial parties to warranty actions when purely economic losses are involved. In contrast, the Santor approval of allowing strict liability recovery for the value of a carpet, where there was no traumatic accident, and where there was no injury to persons or traumatic physical damage to property involved, appears to stretch a strict liability tort theory too far. However, the restrictive warranty features of the Uniform Commercial Code appear to be unfair as far as "ordinary consumer" economic losses are concerned. Ordinary consumers should be given the benefit of implied warranty protection without the restrictive notice, disclaimer and warranty baggage of the Uniform Commercial Code. This, in essence, is a paraphrase form of the

eloquent argument of Justice Peters in Seely. This is a basic change to Uniform Commercial Code law that Congress would have made in the 1975 Magnuson-Moss Warranty Act, if Congress had¹⁶⁶ really been concerned about protecting the pecuniary interests of ordinary consumers.

Chapter II Footnotes

32. Restatement (Second) of Torts § 402A (1965).
33. Id.
34. See Appendix, part I.
35. See Appendix, part II.
36. See Appendix, part III.
37. See Appendix, part IV.
38. See Appendix, part V.
39. California rejected the unreasonably dangerous provision of Section 402A because the Supreme Court concluded the provision improperly injects a negligence element in strict products liability law. Cronin v. J. B. E. Olson Corp., 8 Cal. 3d 121, 123, 501 P.2d 1153, 1155, 104 Cal. Rptr. 433, 435 (1972). Georgia and New Jersey agree with the California court on this point. Center Chem Co. v. Parzini, 234 Ga. 868, 870, 218 S.E.2d 580, 582 (1975); Glass v. Ford Motor Co., 123 N.J. Super. 599, 601, 304 A.2d 562, 564 (1973).
40. See note 4 supra and accompanying text for the Greenman formulation of strict products liability that preceded the promulgation of Section 402A by two years. Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963). Since then Alaska, Delaware, Minnesota, Nebraska and New Jersey have adopted the Greenman formulation of strict liability rather than Section 402A. Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244, 248 (Alas. 1969); Martin v. Ryder Truck Rental, Inc., 353 A.2d 581, 584-86 (Del. 1976); McCormack v. Hanksraft Co., 278 Minn. 322, 337, 154 N.W.2d 488, 499 (1967); Kohler v. Ford Motor Co., 187 Neb. 428, 435, 191

N.W.2d 601, 606 (1971); Santor v. A. & M. Karagheusian, Inc.,
44 N.J. 52, 64-65, 207 A.2d 305, 311 (1965).

41. At common law the liability for abnormally dangerous activities was generally referred to as absolute liability; it is sometimes referred to as strict liability today. This type of liability was normally imposed for harm caused by blasting, stored dynamite and gunpowder or other chemicals, explosions from oil drilling, the escape of stored oil or water, crop-dusting, and falling aircraft. See generally Katz, The Function of Tort Liability in Technology Assessment, 38 U. Cin. L. Rev. 587, 641 (1969).
42. Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972), quoting from Reader v. General Motors Corp., 107 Ariz. 149, 483 P.2d 1388 (1971).
43. The Arkansas legislature enacted Section 402A of the Restatement with certain modifications. The Arkansas statute uses the term "supplier" instead of "seller" as used in Section 402A. Ark. Stat. Ann. § 85-2-318.2 (Supp. 1973).
44. California, Georgia and New Jersey have rejected the "unreasonably dangerous" provision of Section 402A. See note 39 supra.
45. See Rossignol v. Danbury School of Aero., Inc., 154 Conn. 549, 227 A.2d 418 (1967) (elements stated); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (elements stated); and Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970) (jury instruction setting out elements).
46. Woods, The Personal Injury Action In Warranty - Has The Arkansas Strict Liability Statute Rendered It Obsolete?, 28 Ark. L. Rev. 335, 346 (1974). In Santor v. A. & M. Karagheusian,

- cited in note 40 supra, Judge Francis defined a defective product as one which is not reasonably fit for the ordinary purposes for which such articles are sold and used. This language is almost identical with U.C.C. 2-314(2)(c).
47. Cited in note 4 supra.
 48. Cited in note 5 supra.
 49. Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363 (1965).
 50. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 826 (1966).
 51. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 836-38 (1973); Keeton, Product Liability and the Meaning of Defects, 5 St. Mary's L.J. 30, 38 (1973). See also, Phillips, The Standard For Determining Defectiveness In Products Liability, 46 U. Cin. L. Rev. 101 (1977); J. E. Montgomery and D. G. Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C. L. Rev. 803, 808-24 (1976).
 52. Restatement (Second) of Torts § 402A, Comment (i) (1965).
 53. Krause v. Sud-Aviation, Societe Nationale De Constructions Aeronautiques, 413 F.2d 428 (2d Cir. 1969) (negligence and implied warranty action).
 54. Parker v. Ford Motor Co., 296 S.W.2d 35 (Mo. 1956) (negligence action).
 55. Shoshone Coca Cola Bottling Co. v. Dolinski, 82 Nev. 439, 420 P.2d 855 (1966) (strict liability action).
 56. Phillips, The Standard For Determining Defectiveness in Products Liability, 46 U. Cin. L. Rev. 101, 103 (1977).

57. Phillips v. Kimwood Machine Co., 269 Ore. 485, 525 P.2d 1033 (1974).
58. Byrns v. Riddell, Inc., 550 P.2d 1065 (Ariz. 1976).
59. Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), aff'd, 474 F.2d 1339 (3d Cir. 1973).
60. Wade, On the Nature of Strict Liability for Products, 44 Miss. L.J. 825, 837-38 (1973).
61. See, e.g., Burton v. L. O. Smith Foundry Products Co., 529 F.2d 108 (7th Cir. 1976) (applying Indiana law); Sherrill v. Royal Industries, Inc., 526 F.2d 507 (8th Cir. 1975) (applying Nebraska law).
62. See, e.g., Davis v. Fox River Tractor Co., 518 F.2d 481 (10th Cir. 1975) (applying Oklahoma law); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229 (1970); Casey v. Gifford Wood Co., 61 Mich. App. 208, 232 N.W.2d 360 (1975); Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970).
63. 301 N.Y. 468, 95 N.E.2d 802 (1950). Campo was overruled by Micallef v. Michle Co., Division of Michle-Goss-Dexter Inc., 39 N.Y.2d 376, 384 N.Y.S.2d 115 (1976).
64. Dorsey v. Yoder Co., cited supra note 59.
65. Hall v. E. I. duPont deNemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y. 1972); Ford Motor Co. v. Thomas, 231 So. 2d 88 (Ala. 1970); Hill v. Husky Briquetting, Inc., 54 Mich. App. 17, 220 N.W.2d 137, aff'd, 393 Mich. 136, 223 N.W.2d 290 (1974).
66. Gelsumino v. E. W. Bliss Co., 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973).
67. Stanfield v. Medalist Industries, Inc., 34 Ill. App. 3d 635, 340 N.E.2d 276 (1975).

68. See, e.g., Hoenig, Product Designs and Strict Tort Liability: Is There a Better Approach?, 8 Sw. U. L. Rev. 109 (1976); Henderson, Design Defect Litigation Revisited, 61 Cornell L. Rev. 541 (1976); Twerski et al., The Use and Abuse of Warnings in Products Liability - Design Defect Litigation Comes of Age, 61 Cornell L. Rev. 495 (1976).
69. Walsh v. National Seating Co., 411 F. Supp. 564, 570 (D. Mass. 1976).
70. Basko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969) (applying Connecticut law).
71. Ghera v. Ford Motor Co., 246 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965); Restatement (Second) of Torts § 388 (1965).
72. Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) (applying Montana law).
73. See, e.g., Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809 (9th Cir. 1974) (applying Montana law); Barth v. B. F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968). But see Hasson v. Ford Motor Co., 51 Cal. App. 3d 104, 123 Cal. Rptr. 798 (1975).
74. For example, Comment j would apply strict liability to manufacturers in allergy cases where there has been a failure to warn and the manufacturer "has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge" of the presence of the allergenic ingredient and the danger.
75. Comment h requires the seller to warn of dangers where it "has reason to anticipate that danger may result" from a particular use of the product.

76. Davis v. Wyeth Laboratories, Inc., cited supra note 72; Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264 (5th Cir.), cert. denied, 419 U.S. 1096 (1974) (applying Texas law). Of overriding concern in these drug cases was that a failure to warn of dangers, however remote, deprived a user of effective and informed "choice" of whether or not to use the drug.
77. Hall v. E. I. duPont deNemours & Co., cited supra note 65; Cannifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).
78. McCormack v. Hanksraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967).
79. Mountain v. Procter & Gamble Co., 312 F. Supp. 534 (D. Wis. 1970).
80. See, e.g., Wagner v. Larsen, 257 Iowa 1202, 136 N.W.2d 312 (1965); Penn v. Inferno Manufacturing Corp., 199 So. 2d 210 (La. App.), aff'd, 215 La. 27, 202 So. 2d 649 (1967).
81. See, e.g., Tinnerholm v. Parke-Davis & Co., 385 F. Supp. 432 (S.D.N.Y. 1968), aff'd, 411 F.2d 48 (2d Cir. 1969) (applying New York law).
82. 493 F.2d 1076, 1089 (5th Cir. 1973) (applying Texas law after Texas had adopted strict products liability).
83. Braniff Airways, Inc. v. Curtiss-Wright Corp., 411 F.2d 451 (2d Cir. 1969).
84. Rumsey v. Freeway Manor Minimax, 423 S.W.2d 387 (Tex. Cir. App. 1968).
85. Id. at 394.
86. 16 Ill. App 3d 339, 306 N.E.2d 312 (1973).
87. U.C.C. §§ 2-313 to 2-318.
88. Restatement (Second) of Torts § 402B (1965):

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes

to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though (a) it is not made fraudulently or negligently, and (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

89. Green, Strict Liability Under Sections 402A and 402B: A Decade of Litigation, 54 Tex. L. Rev. 1185, 1186-87 (1976).
90. 202 Okla. 82, 210 P.2d 348 (1949).
91. 210 P.2d at 351. In Wat Henry Pontiac Co., defendant verbally told plaintiff that the used car was "mechanically perfect" and that "it is in A-1 shape." Repair expenses were allowed on an express warranty theory because plaintiff relied on these assertions and the court was persuaded that these representations by the seller were assertions of fact, rather than mere "puffing" which is not actionable under a warranty theory.
92. 208 Kan. 720, 494 P.2d 1211 (1972). In Huebert, plaintiff suffered shock injuries when attempting to repair an electrical panel board in a cold storage company. Recovery was allowed even though no "defect" was proved because the product did not function as expressly warranted by defendant manufacturer. Compare the liberal holding of Huebert with the well-known case of Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932), where defendant's catalogues and printed sales matter were allowed in evidence, and plaintiff recovered for eye injuries suffered when defendant's advertised "shatter-proof" glass windshield was in fact defective causing it to shatter when struck by a pebble.
93. 330 Mass. 177, 112 N.E.2d 254 (1953).

94. 196 N.W.2d 70 (N.D. 1972).
95. U.C.C. § 2-316.
96. Back Trucks of Ark., Inc. v. Jet Asphalt & Rock Co., 246 Ark. 101, 437 S.W.2d 459 (1969).
97. See negation language contained in U.C.C. § 2-316 (1).
98. U.C.C. § 2-719.
99. U.C.C. § 2-302, Comment 1.
100. 126 N.J. Super. 401, 315 A.2d 30 (1973), aff'd, 64 N.J. 260, 315 A.2d 16 (1974).
101. See McNichold, Who Says That Strict Tort Disclaimers Can Never Be Effective? The Courts Cannot Agree, 28 Okla. L. Rev. 494 (1975).
102. Rieder, Exculpatory Clauses, 36 Ala. Law. 254 (1975); Note, Contractors-Interpretation of Hold Harmless Clauses - Liability For Damage To Adjoining Land, 46 Tul. L. Rev. 537 (1972).
103. Fahlgren, Unconscionability: Warranty Disclaimers And Consequential Damage Limitations, 20 St. Louis U. L.J. 435 (1976); Comment, Uniform Commercial Code: Disclaimer Of Implied Warranties From A Manufacturer's Perspective, 80 Dick. L. Rev. 566 (1976); Comment, Uniform Commercial Code: Limitations On Personal Injury Damages For Breach Of Warranty - Toward Per Se Unconscionability? 14 Washburn L.J. 708 (1975); Parker, The Warranty Disclaimer v. Manufacturers Products Liability - Sterner Aero AB v. Page Airmotive, Inc.: Did The Tenth Circuit Bury The Disclaimer Alive? 10 Tulsa L.J. 612 (1975); Woods, The Personal Injury Action In Warranty - Has The Arkansas Strict Liability Statute Rendered It Obsolete?, 28 Ark. L. Rev. 335 (1974); C. Reitz & M. Seabolt, Warranties and Product Liability: Who Can Sue and Where?, 46 Temp. L.Q. 527 (1973).

104. Brooks, Inspection, Acceptance and Warranties In Federal Government Contracts, 1975 U. Ill. L.F. 198; Note, Application of the Uniform Commercial Code to Federal Government Contracts: Doing Business on Business Terms, 16 Wm. & Mary L. Rev. 395 (1974); Patten, The Implied Warranty That Attaches To Government Furnished Design Specifications, 31 Fed. B.J. 291 (1972); Spriggs, Implied Warranties Under Government Contracts, 4 Pub. Cont. L.J. 80 (1971); Payne, Government Contract Warranties: Isn't the Caveat Venditor Rather Than Emptor?, 4 Nat'l Cont. Management J. 31 (1970). The main purpose of warranty or guaranty clauses in government contracts is to remove the finality and conclusiveness of acceptance. In contrast, the main purpose of warranties under the Uniform Commercial Code is to determine standards which contract articles must meet. In government contracts such standards are normally covered expressly in detailed specifications or work statements. Nonetheless, implied warranties of merchantability or fitness for a particular purpose may apply to government contracts in appropriate cases.
105. 15 U.S.C. § 2301 et seq. (1975).
106. Id. at § 2302 (b) (2).
107. Id. at § 2302 (a).
108. Id. at § 2304 (a).
109. Id. at § 2304 (b) (1).
110. Id. at § 2310 (a).
111. Id. at § 2310 (d) (2).

112.

Assume Plaintiff's Actual
Damages Are \$1,000

Percent Plaintiff Was Negligent	Pure Form	Mod. Form 50%	Mod. Form 49%	Slight & Gross
10% negligent	\$900	\$900	\$900	\$900
49% negligent	510	510	510	0
50% negligent	500	500	0	0
51% negligent	490	0	0	0
90% negligent	100	0	0	0

113. Alaska: Kaatz v. Alaska, 540 P.2d 1037 (Alas. 1975) (pure form).

Arkansas: Ark. Stat. Ann. § 27-1765 (1955) (49% form).

California: Li. v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (pure form).

Colorado: Colo. Rev. Stat. Ann. § 13-21-111 (1975) (49% form).

Connecticut: Conn. Gen. Stat. Ann. § 52-572h (1975) (50% form).

Florida: Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (pure form).

Georgia: Ga. Code Ann. § 94-703 (1972) (49% form).

Hawaii: Hawaii Rev. Stat. § 663-31 (Supp 1975) (49% form).

Idaho: Idaho Code Ann. § 6-801 (Supp 1974) (49% form).

Kansas: Kan. Stat. Ann. § 60-285a (Supp 1974) (49% form).

Maine: Me. Rev. Stat. Ann. tit. 14, § 156 (Supp 1969) (49% form).

Massachusetts: Mass. Gen. Laws, Ch.231, § 85 (Supp 1969) (49% form).

Minnesota: Minn. Stat. Ann. § 604.01 (Supp 1969) (49% form).

Mississippi: Miss. Code Ann. § 11-7-15 (1972) (pure form).

Montana: Mont. Rev. Code Ann. § 58-607.1 (1975) (50% form).

Nebraska: Neb. Rev. Stat. § 25-1151 (1964) (slight vs. gross form).

Nevada: Nev. Rev. Stat. § 41.141 (1973) (50% form).

New Hampshire: N.H. Rev. Stat. Ann. § 507.7a (Supp 1973) (50% form).

New Jersey: N.J. Stat. Ann. § 2a 15-51 (Supp 1973) (50% form).

New York: N.Y. Law, Civ. Prac. § 1411-13 (1975) (pure form).
 North Dakota: N.D. Cent. Code § 9-10-07 (1973) (49% form).
 Oklahoma: Okla. Stat. Ann. tit. 23, § 11 (Supp 1973) (49% form).
 Oregon: Ore. Rev. Stat. § 18.470 (1971) (49% form).
 Pennsylvania: Pa. Stat. Ann. tit. 17, § 2101 (1976) (50% form).
 Rhode Island: R.I. Gen. Laws Ann. § 9-20-4 (1972) (pure form).
 South Dakota: S.D. Comp. Laws Ann. § 20-9-2 (1974) (slight vs. gross form).
 Texas: Tex. Rev. Civ. Stat. Ann. Art. 2212a §§ 1,2 (Supp 1976-1977) (50% form).
 Utah: Utah Code Ann. § 78-27-37 (1973) (49% form).
 Vermont: Vt. Stat. Ann. tit. 12, § 1036 (1970) (50% form).
 Washington: Wash. Rev. Code § 4.22.010 (Supp 1974) (pure form).
 Wisconsin: Wis. Stat. Ann. § 895.045 (Supp 1974) (50% form).
 Wyoming: Wyo. Stat. Ann. § 1-7.2 (Supp 1973) (49% form).

114. Id.

115. Section 2-607 (3) (a) of the Uniform Commercial Code provides:

The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy.

116. Under the Uniform Commercial Code (Section 2-316) both express and implied warranties may be disclaimed if done in a conscionable manner. Disclaimers are also allowed in proper circumstances under the Magnusen-Moss Warranty Act. See discussion of disclaimers above.

117. Brown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966);
Arrow Transp. Co. v. A. O. Smith Co., 75 Wash. 2d 843, 454 P.2d 387 (1969).

118. Chapman v. Brown, 198 F. Supp. 79 (D. Hawaii), aff'd, 304 F.2d 149 (9th Cir. 1962).

119. Kassouf v. Lee Brothers, 209 Cal. App. 2d 68, 26 Cal. Rptr. 276 (1972); Bahlman v. Hudson Motor Co., 290 Mich. 683, 288 N.W. 309 (1939).
120. For example, the amendment of the Arkansas Comparative Fault Act, made by Act 367 of 1975, includes breach of warranty in its definition of "fault", thereby making contributory negligence and assumption of risk both fault concepts that will be compared to defendant's fault when assessing damages.
121. Restatement (Second) of Torts § 402A, Comment n (1965).
122. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
123. Stephan v. Sears, Roebuck & Co., 110 N.H. 248, 266 A.2d 855 (1970).
124. See Thomas v. American Dystoscope Makers, Inc., 414 F. Supp. 255 (E.D. Pa. 1976).
125. 337 A.2d 893, 901 (Pa. 1975).
126. 534 S.W.2d 916 (Tex. Civ. App. 1976).
127. Findlay v. Copeland Lumber Co., 265 Ore. 300, 509 P.2d 28 (1973).
128. Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1975).
129. McCurter v. Norton Co., 263 Cal. App. 2d 402, 69 Cal. Rptr. 493 (1968).
130. Erickson v. Sears, Roebuck & Co., 240 Cal. App. 2d 793, 50 Cal. Rptr. 143 (1966).
131. 63 Wis. 2d 728, 218 N.W.2d 279 (1974). Contra, Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976).
132. 37 Wis. 2d 443, 155 N.W.2d 55 (1967). Cf. Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977) (distinguishes types of assumption of risk).
133. 339 F. Supp. 676 (D.N.H. 1972).

134. 336 So. 2d 80 (Fla. 1976).
135. Id. at 90. Accord, Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., supra note 131.
136. 555 P.2d 42 (Alas. 1976).
137. Id. at 45.
138. 548 S.W.2d 344 (Tex. 1977).
139. Id. at 352.
140. Id.
141. Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) (applying Mississippi law); Chapman v. Brown, 198 F. Supp. 79 (D. Hawaii), aff'd, 304 F.2d 149 (9th Cir. 1962); Haney v. International Harvester Co., 294 Minn. 375, 201 N.W.2d 140 (1972); Etten v. Ava. Truck Leasing, Inc., 53 N.J. 463, 251 A.2d 278 (1969); Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc., 39 N.Y.2d 376, 384 N.Y.S.2d 115 (1976); Ritter v. Narragansett Electric Co., 109 R.I. 176, 283 A.2d 255 (1971).
142. 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).
143. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
144. Cited supra note 141.
145. 553 P.2d 835 (Colo. App. 1976).
146. Cited supra note 122.
147. See note 145 supra, at 837.
148. Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974).
149. Pinto, Comparative Responsibility - An Idea Whose Time Has Come, 45 Ins. Counsel J. 115 (1978); Kroll, Comparative Fault: A New Generation in Products Liability, 1977 Ins. L.J. 492; Kircher, Products Liability - The Defense Position, 44 Ins. Counsel J.

- 276 (1977); Hoenig, Products Liability Problems and Proposed Reforms, 1977 Ins. L.J. 213; Feinberg, The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2D (Can Oil and Water Mix?), 42 Ins. Counsel J. 39 (1975).
150. Levine, Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault, 14 San Diego L. Rev. 337 (1977).
151. Wade, Products Liability and Plaintiff's Fault - The Uniform Comparative Fault Act, 29 Mercer L. Rev. 373, 377 (1978).
152. The Act with Comments appears at page 392 of 29 Mercer L. Rev. 373 (1978).
153. See note 151, supra at 374.
154. See note 145, supra, and accompanying text.
155. See note 138, supra, and accompanying text.
156. See, e.g., Kircher, supra note 149, at 284 (49% form comparative responsibility proposal).
157. See note 11, supra.
158. 12 N.Y.2d 473, 191 N.E.2d 299, 240 N.Y.S.2d 743 (1963).
159. See Neumeier v. Kuehner, 31 N.Y.2d 21, 286 N.E.2d 454, 335 N.Y.S. 2d 64 (1972). California has developed the "governmental interest" approach even further than New York. See Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).
160. 20 ATLA L. Rep. 408-09 (November, 1977). See also collected Essays, Contemporary Perspectives in Conflict of Laws, 41 L. & Contemp. Prob. 1 (1977).
161. See, e.g., Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977) (Comparative negligence and rules of the road);

Milkovitch v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973) (ordinary negligence or host-guest statute); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968) (comparative negligence); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966) (host-guest statute); Woodward v. Stewart, 243 A.2d 917 (R.I. 1968) (wrongful death acts); and Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967) (host-guest statute).

162. 44 N.J. 52, 207 A.2d 305 (1965).
163. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). Accord, Anthony v. Kelsey-Haynes Co., 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (2d Dist. 1972) (defective truck wheels).
164. 207 A.2d at 312.
165. 45 Cal. Rptr. at 23, 403 P.2d at 151.
166. Proposed Section 552D of the Restatement (Second) of Torts extends relief to members of the public who suffer pecuniary loss through misrepresentation:

Section 552D. Misrepresentation By Seller of Chattels To Public

One engaged in the business of selling chattels who, by advertising, labels or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a pecuniary loss caused to another by his purchase of the chattel in justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

Comment: a. This Section parallels Section 402B, which states the rule as to strict liability for physical harm to a user or consumer of the chattel, where the seller makes a misrepresentation to the public concerning its character or quality. This Section states the same rule, as to liability for pecuniary loss, caused to one who purchases the chattel in justifiable reliance on the representation. The Comments under Section 402B are applicable here, so far as they are pertinent.

It should be noted that this section applies only to misstatements of material fact and does not apply to mere "sales talk" or "puffing". (See Section 402B, Comment g). See generally Ribstein, Guidelines for Deciding Product Economic Loss Cases, 29 Mercer L. Rev. 493 (1978), for an excellent discussion of economic loss cases.

111. PRODUCTS LIABILITY LAW AND GOVERNMENT CONTRACTS

A. Third Party Liability of Government Contractors

Depending upon applicable state law, contractors with the federal government may be subject to third party liability on negligence, warranty or strict products liability theories of recovery. The expression "third party liability" means tort liability to individuals other than the federal government or the contractor, who of course are the two parties to the government contract. However, the expression "third party liability" includes potential liability of the contractor to government employees, both military and civilian, and potential liability of the federal government to contractor employees. Either the contractor or the federal government, or both, may be liable to other individuals who suffer harm because of contract activities.

It should be made clear at the outset, however, that the contractor is the entity that bears the direct risk of liability to third parties under products liability law. In many instances contractors are also manufacturers, sellers or suppliers, which renders them vulnerable to products liability suits. There is also a trend to include construction and services within the ambit of strict liability law, which further enlarges the scope of potential contractor liability.

In contrast, the federal government is essentially insulated from direct liability under products liability laws. The role of the federal government is generally restricted to buying and using the products and services of contractors; therefore, the federal government normally would not assume a

legal status that would be directly vulnerable to liability under products liability laws. Moreover, the Federal Tort Claims Act waiver of sovereign immunity has been clearly interpreted by the Supreme Court to embrace only negligence¹⁶⁷ actions. With this distinction between potential contractor and government liability in mind, a discussion of the direct vulnerability of contractors under state products liability laws becomes more meaningful.

1. Supply Contracts

Case law clearly indicates government supply contractors generally share the same degree of legal vulnerability to injured third parties as non-contractor defendants in products¹⁶⁸ liability suits. Defense attorneys have devised several ingenious defenses for government contractors, but as the following cases will show, contractors have enjoyed little success in defending against these suits. The defenses have generally centered around the special relationship of the contractors to the federal government.

¹⁶⁹
In Whitaker v. Harvell-Kilgore Corp., an Army enlisted man was severely injured by the premature explosion of a hand grenade during training exercises at Ft. Benning, Georgia. He brought suit against the manufacturer of the grenade and the manufacturer of the fuse employed therein - each of whom was a governmental contractor - alleging negligence, breach of express and implied warranties, and strict liability in tort. Applying Georgia law, the Court of Appeals for the Fifth Circuit ruled plaintiff could proceed on his negligence theory, but dismissed the warranty and strict liability counts. The

court reasoned Georgia law would require privity of contract in an implied warranty action, and also observed plaintiff did not enjoy the requisite status (person who is in the family or household of the buyer or a guest in his home) to support an express or implied warranty action. The strict liability action was dismissed because Georgia had not adopted strict products liability at that time. The court did not accept defendant contractors' postulated defense of sovereign immunity, concluding that defendants were independent contractors. The defendants' "alter ego" or sovereign immunity defense was based upon the specifications, standards and close supervision of the government, and upon claims of entitlement to indemnity from the government. One of the defendants also argued plaintiff would not have a direct cause of action against the United States under the doctrine of Feres v.¹⁷⁰ United States, and therefore contended plaintiff should also be precluded from bringing suit against a government contractor. The court was not persuaded by any of these arguments and remanded the case for proceedings on the negligence theory. In reaching its decision, the court acknowledged it was highly influenced by the following Supreme Court language from Powell v.¹⁷¹ United States Cartridge Company:

In these great projects built for and owned by the Government, it was almost inevitable that the new equipment and materials would be supplied largely by the Government and that the products would be owned and used by the Government. It was essential that the Government supervise closely the expenditures made and the specifications and standards established by it. These incidents of the program did not, however, prevent the placing of managerial responsibility upon independent contractors.¹⁷²

The Court of Appeals for the Eighth Circuit was confronted with a similar hand grenade case in Foster v. Day & Zimmerman, Inc.¹⁷³ In Foster, plaintiff suffered serious injuries when a hand grenade exploded in his hand during a training exercise. At the time of injury, plaintiff was enrolled in the Army Reserve Officers Training Program at Ft. Benning, Georgia. Rather than bring suit in the appropriate federal district court in Georgia, and risk the adverse choice of law rulings of Whitaker, plaintiff brought suit in the District Court for the Southern District of Iowa. The manufacturer of the grenade fuse, named as a defendant in the suit, was an Iowa corporation. Although the relevant choice of law facts were very complex, the federal district court was deemed to have properly applied Iowa conflict of laws rules, and plaintiff was thereby enabled to successfully maintain a strict products liability action against defendants under Iowa law. Moreover, the court stated the evidence supported an instruction to the jury on res ipsa loquitur. As a final blow to defendants, the court rejected all of defendants' sovereign immunity defense arguments,¹⁷⁴ expressly agreeing with the Whitaker court in that regard.

¹⁷⁵
The next case, Challoner v. Day & Zimmerman, a 1975 decision by the Court of Appeals for the Fifth Circuit, involves an even more remarkable set of facts. The plaintiffs in Challoner were an injured serviceman and the estate of a deceased serviceman. The injury and death, attributable to the premature explosion of a howitzer round, occurred while the servicemen were engaged in combat in Cambodia against the North Vietnamese. Defendant was a Texas ammunition manufacturer and

suit was brought in the District Court for the Eastern District of Texas. The Fifth Circuit held the District Court correctly applied Texas substantive law rather than Cambodian law, since the case was one in which the policies of all jurisdictions having an interest in the dispute would be carried out through application of Texas law. Hence, plaintiffs were allowed to recover under Texas strict products liability law. Significantly, recovery was allowed even though defendant manufacturer (government contractor) was a nonseller who simply assembled materials purchased by the government. The court held that the manufacturer could be found strictly liable if the product was defectively designed, even if the design was exclusively within government control. The court specifically stated:

In this case, it was not necessary to prove negligence. The theory alleged is strict liability. A strict liability case, unlike a negligence case, does not require that the defendant's act or omission be the cause of the defect. It is only necessary that the product be defective when it leaves the defendant's control.¹⁷⁶

The Supreme Court reversed in a per curiam opinion, holding that the lower courts erred in not applying Texas choice of law rules. The case was remanded with instructions to the Fifth Circuit to identify and follow the Texas conflicts rule. Mr. Justice Blackman wrote a concurring opinion to emphasize, in his view, that application of Texas choice of law rules would not necessarily compel the determination that only the law of Cambodia would be applicable.

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Stencel Aero Engineering Corp. v. United States, styled
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Donham v. United States in the federal circuit court below, is

the most recent military products liability case decided by the Supreme Court. In Stencel, Captain John C. Donham, an Air Force Reserve pilot assigned for training to the Missouri Air National Guard, suffered serious and permanent injuries when the egress life support system (ejection seat) malfunctioned during an emergency ejection from his F-100 jet aircraft. The ejection system was manufactured by Stencel Aero Engineering Corporation pursuant to government specifications, and certain components of the ejection system were provided by the government. The Supreme Court noted that there was no contractual relationship between the United States and Stencel. Stencel had contracted with North American Rockwell, the prime government contractor, to provide the F-100 ejection system.¹⁷⁹

Captain Donham was awarded a lifetime pension of approximately \$1,500 per month under the Veterans' Benefits Act,¹⁸⁰ but nonetheless brought a joint negligence action against the United States and Stencel in the Eastern District of Missouri, claiming damages of \$2,500,000. The United States moved for summary judgment against Donham under the Feres doctrine,¹⁸¹ contending that he could not recover under the Federal Tort Claims Act against the government for injuries sustained incident to military service. The District Court granted the motion. The United States further moved for dismissal of Stencel's cross-claim, asserting that Feres also bars an indemnity action by a third party for monies paid to military personnel who could not recover directly from the United States. This latter motion, which was also granted by the District Court, will be discussed in greater detail below in the context

of indemnity and contribution claims against the federal
government. The Court of Appeals for the Eighth Circuit and
the Supreme Court affirmed.¹⁸²
¹⁸³

Mr. Justice Marshall, with whom Mr. Justice Brennan joined, dissented from the majority Stencel holding. Mr. Justice Marshall's comments regarding a hypothetical cause of action by an injured civilian is particularly significant:

Had the same malfunction in the pilot eject system that caused the serviceman's injuries here also caused that system to plunge into a civilian's house, the injured civilian would unquestionably have a cause of action under the Tort Claims Act against the Government. He might also sue petitioner Stencel, which might, as it has done here, cross-claim against the Government.¹⁸⁴

Other cases brought by servicemen plaintiffs against manufacturers and contractors have been actively discussed by
commentators.¹⁸⁵ The right of federal civilian employees to bring tort suits or product liability actions against manufacturers
and contractors has also been clearly established.¹⁸⁶ And as stated by Mr. Justice Marshall above, ordinary injured civilians would unquestionably have actions against the government under the Federal Tort Claims Act, and actions against manufacturers and contractors under applicable state law.

2. Construction Contracts

The government construction contractor, like his counterpart in the private sector, is becoming more vulnerable to third party products liability actions stemming from defective construction. This increased vulnerability has become a reality despite the fact that products liability law is generally thought of as being applicable to defects in products or supplies, rather than
defects in construction.¹⁸⁷ Additionally, construction contractors

once assumed they would not be subject to strict liability laws because they reasoned they provided a service rather than a product; however, one commentator is of the opinion service transactions will increasingly be the subject of strict liability actions.¹⁸⁸ A plaintiff in defective construction cases generally relies on negligence or strict liability theories, since third party beneficiary status under a government contract is normally not available unless the contract specifically gives the injured party a right to sue in that capacity.¹⁸⁹

The products liability vulnerability of government construction contractors is aptly illustrated by Barr v. Brezina Construction Co.,¹⁹⁰ a 1972 decision by the Tenth Circuit Court of Appeals. In Barr, defendant contractor constructed a stairway on an Air Force base pursuant to government specifications. The contractor informed the government that the plans for the stairway were unsafe; nevertheless, the government instructed the contractor to proceed according to the design. Barr, an active duty member of the military, subsequently fell and was injured as a result of the deficient design of the stairs. Although the Feres doctrine precluded Barr from bringing suit against the United States under the Federal Tort Claims Act, Barr was able to successfully sue the construction contractor and was awarded a \$45,000 judgment. The contractor's indemnity claim against the United States was denied on the basis of state law.

Although not a case involving a government contractor, the 1965 New Jersey case of Schipper v. Levitt & Sons, Inc.,¹⁹¹ is worthy of comment. Schipper was the first case to apply strict liability in tort against a land developer for selling a home

with a defective component. In that case, Schipper's infant son was severely scalded when a defective mixing valve in a heating unit failed to properly reduce the water temperature. The Schipper opinion contains the following pertinent language:

We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. That being so, the warranty or strict liability principles of Henningsen and Santor should be carried over into the realty field, at least in the aspect dealt with here....¹⁹²

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Obviously, government "turnkey" construction contractors who are responsible for the detailed design and construction of large-scale housing projects on government installations would be vulnerable to strict products liability claims in any jurisdiction following the Schipper rationale.

Although third party products liability suits against construction contractors are encountered on a less frequent basis than products liability actions against manufacturers and contractors who produce and sell supplies, there appears to be a trend toward wider application of products liability theories against construction contractors. The law seems to be in an initial state of development in this regard, but it is reasonable to conclude that construction contractors will face increased vulnerability to products liability suits in the future.

B. Impact of Indemnity and Contribution

1. General Law Relating To Indemnity and Contribution

The complex concepts of indemnity and contribution pertain to tort loss allocation among two or more responsible parties.

Generally, indemnity and contribution do not directly affect the plaintiff; he can elect to sue one or all of the responsible parties. If the plaintiff sues only one responsible defendant, he has the potential of recovering all of his damages against that one defendant. That one defendant would then be concerned about shifting part or all of the loss to another responsible party, either through impleading any other responsible party into the original lawsuit, or by attempting to assert a separate indemnity or contribution claim against any other responsible party at the conclusion of the original lawsuit. If, on the other hand, the plaintiff sues two or more responsible defendants in the original action, any one defendant may attempt to shift part or all of his loss to another named defendant by way of a cross-claim. Any one of the named defendants would also have the option of impleading any other responsible party not named as a defendant by the plaintiff. If the plaintiff sues two or more tortfeasors and prevails against them at the trial, the responsible defendants are "jointly and severally" liable to the plaintiff. This means the plaintiff could recover all of his damages against any one defendant. If that should happen, that one defendant would be concerned about shifting part or all of the loss to the other responsible parties. All of these various fact patterns, which are by no means exhaustive, involve both procedural problems and substantive problems. The procedural problems have to do with impleading, cross-claims and other matters relating to what is generally known as "third party practice." Rule 13 and Rule 14 of the Federal Rules of Civil Procedure contain guidance on these procedural matters. The substantive problems relating

to tort loss allocation among two or more responsible parties, however, have to do with the principles of law which are generally referred to as indemnification and contribution. It is these substantive concepts of indemnity and contribution that are the primary concern of this chapter.

Indemnity has been defined as, "a right which inures to a person who has discharged a duty which is owed by him but which, as between himself and another, should have been discharged by the other."¹⁹⁴ Indemnity is normally thought of as shifting the entire loss to another party, and it has been held that indemnity may arise either in contract or in tort: by an express or implied contract to indemnify, or by equitable concepts based on a tort theory of indemnity.¹⁹⁵ The rule proposed in the Restatement of Restitution makes no specific reference to contract and appears to be based on principles of equity. It provides that, "a person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor [Indemnitee]¹⁹⁶ is barred by the wrongful nature of his conduct." Federal law is controlling as to the right of the federal government to indemnification under an indemnity contract into which it has entered; such a contract is not repugnant to the Federal Tort Claims Act or contrary to public policy.¹⁹⁷ But where an action to obtain indemnity is brought in a federal court on the ground of diversity of citizenship, the general rule of Erie Railroad Co. v. Tompkins¹⁹⁸ applies, and the federal court will be governed by the state court decisions on the subject, and also that state's choice of law rules.¹⁹⁹

Over the years the courts have wrestled with the concept of indemnity, resulting in the development of various tests to determine when indemnity would be allowed. Among the tests devised are the active-passive test, the primary-secondary test, and the duty versus no-duty test.²⁰⁰ However, the courts' definitions of each individual test have been criticized as being vague, and the application of each test has been criticized as being²⁰¹ illogical and inconsistent.

Indemnity agreements are usually not held to be against public policy, even when they provide for nonliability or reimbursement for injuries caused by the indemnitee's own negligence. There is general agreement among the courts, however, that an indemnity agreement must make it very clear that the indemnitee is being released from the consequences of his own fault or negligence before such an agreement will be judicially enforced.²⁰²

Contribution began evolving at a later point in time than indemnity. The concept of contribution was needed to overcome the all-or-nothing nature of indemnity when two or more parties were responsible for harming the person or property of another individual. Under the reasoning of an early English case,²⁰³ Merryweather v. Nixon, intentional wrongdoers were not allowed to apportion liability between themselves. This rule was carried over into negligence actions and produced harsh results when two or more defendants negligently caused plaintiff's injuries, but only one of the negligent tortfeasors ended up paying the full amount of plaintiff's damages. Those jurisdictions adopting contribution allowed responsible defendants to apportion liability among themselves, sometimes on a pro rata (equal shares) basis and

sometimes on a relative percentage of fault basis.

Contribution has been defined as "a payment made by each person, or by any of several persons, having a common interest or liability, of his share in the loss suffered or in the money necessarily paid by one of the parties in behalf of the others." ²⁰⁴ The general rule is that one who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable, is entitled to contribution against the others to obtain from them payment of their respective shares. ²⁰⁵ The doctrine is based on equitable rather than contractual principles.

Since the doctrine of contribution has its basis in the broad principles of equity, one federal court has reasoned that it should be liberally applied. ²⁰⁶ Except in admiralty, contribution is not a part of the original claim or tort but is an adjustment between the parties independent of the creditor's claim. ²⁰⁷

It has been said that "contribution is a form of, and is but pro tanto, indemnity, that from an equitable viewpoint indemnity is only an enlargement of the remedy of contribution, and that indemnity is only an extreme form of contribution, inasmuch as both are based upon, or spring from the idea of, equilization of burden." ²⁰⁸ Contribution has traditionally been considered to be a contingent right, since it arises from a joint liability, but is enforceable only after the one seeking it has paid or satisfied more than his fair share. ²⁰⁹

In 1939, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Contribution Among Tortfeasors Act. ²¹⁰ That Act provided for the right of contribution among joint

tortfeasors and authorized consideration of relative degrees of fault among such persons in determining each one's share of common liability. A revised Act was drafted by the Commission in 1955, providing that relative degrees of fault should not be considered when determining pro rata shares of common

²¹¹liability. Most states adopting either version of the Act distribute the loss according to the number of parties sharing common liability, not according to the relative degree of fault of the respective parties. Actually, the states have been far ²¹²from uniform in their approach to contribution.

2. Indemnity and Contribution In Government Contract Law

a. Products Liability Cases

(1) Contractor Seeking Indemnity Or Contribution From Government

The most significant products liability case in this category at the present time is Stencel Aero Engineering Corp. v. United ²¹³States, decided by the Supreme Court in 1977. The facts in Stencel, as previously indicated, involved serious and permanent injuries to a military pilot when the ejection system of his F-100 fighter aircraft malfunctioned during an emergency ejection. Although the injured pilot was awarded a lifetime pension under the Veteran's Benefits Act, he brought a negligence suit against the United States and Stencel, the manufacturer of the defective ejection system. Stencel filed an indemnity cross-claim against the United States, alleging that any malfunction in the system was due to faulty government specifications and components. The District Court granted the motions of the United States for summary judgment against the officer and for dismissal of

Stencel's cross-claim, on the ground that the doctrine of Feres
²¹⁴
v. United States barred both the officer's claim and Stencel's
cross-claim. The Court of Appeals for the Eighth Circuit
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affirmed the District Court holding. The Supreme Court granted
certiorari, noting that the circuits had been far from uniform in
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their treatment of the indemnity issue.

The Supreme Court in Stencel immediately acknowledged its
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prior decision in United States v. Yellow Cab Co., wherein the
Court held that the Federal Tort Claims Act permits impleading the
government as a third-party defendant, under a theory of indemnity
or contribution, if the original defendant claims that the United
States was wholly or partially responsible for plaintiff's
injury. Since Stencel involved a serviceman plaintiff, the Court
saw the basic conflict as a tension between the Yellow Cab and
Feres doctrines.

The Court reviewed Stencel's indemnity arguments: (1) that
any malfunction in the egress life-support system used by the
pilot was due to faulty specifications, requirements, and
components provided by the United States or other persons under
contract with the United States; (2) that the malfunctioning
system had been in the exclusive custody and control of the
United States since the time of its manufacture; and (3) that
insofar as Stencel was negligent at all, its negligence was
passive, while the negligence of the United States was active.
²¹⁸
Stencel accordingly prayed for indemnity as to any sums it would
be required to pay the injured pilot.

After a thorough review of the Feres doctrine, the Supreme
Court concluded, by a seven-to-two margin, that the third-party

indemnity action in Stencel was unavailable for essentially the same reasons that the direct action by the military pilot against the United States was barred by Feres. The majority emphasized that the Veterans' Benefits Act provides an upper limit of liability for the government as to service-connected injuries, and to permit Stencel's claim would circumvent such limitation. The majority also stressed that a third-party indemnity action involving a serviceman could have an adverse effect upon military discipline.

Thus, it appears the Supreme Court ended speculation concerning the availability of indemnity against the government where a serviceman plaintiff is involved. The reasoning appears accurate, but the result somehow does not seem fair. Is it fair for the contractor to bear the full amount of the tort damages when the government appears to be partly responsible for plaintiff's injuries? Consideration should also be given to the total amount of the pilot's monetary recovery. Most commentators would probably agree that the permanently injured pilot deserves more than the lifetime Veterans' pension. But is it really fair for the injured pilot to receive a generous lifetime government pension, and the full amount of his tort damages from the contractor? This matter will be discussed again in the concluding chapter.

Although there has been no case on the subject yet, the dissent by Mr. Justice Marshall suggests another interesting problem. What if the ejection seat had fallen on a civilian's house, injuring one or more civilians, and a subsequent suit against the government and the contractor resulted in a finding

of liability on the part of the government under a negligence theory and a finding of liability on the part of the contractor under a warranty or strict products liability theory? The adequacy of present law to resolve an indemnity or contribution dispute of this nature will also be discussed in the last chapter.

Mr. Justice Marshall also made the following astute observation in his dissent concerning the apparent disparity in treatment of cases involving servicemen and civilian employees of the federal government:

The Court also concludes that compensation payments to an injured serviceman under the Veterans' Benefits Act, 38 U.S.C. § 321 et seq., place an absolute upper limit on the Government's liability for service-connected injuries. Yet, nothing in that Act suggests that it is designed to place on third parties, such as petitioner, the burden of fully compensating injuries to servicemen when the Government is at fault. Indeed, the Veterans' Benefits Act does not even contain an explicit declaration that it is the exclusive remedy against the Government for a serviceman's injury. The comparable compensation program for civilian employees of the Government does contain such a limitation of liability. 5 U.S.C. § 8116 (c).²¹⁹ Also referred to as the Federal Employees Compensation Act (FECA), and sometimes as the federal version of worker's compensation.⁷ Yet we have held that the broad language of the exclusivity provision in the civilian compensation scheme does not affect "the rights of unrelated third parties," Weyerhaeuser S. S. Co. v. United States, 372 U.S. 597, 601 (1963), and the lower courts have allowed indemnity suits identical to petitioner's to proceed despite that provision. See, e.g., Travelers Ins. Co. v. United States, 493 F.2d 881 (CA3 1974). The Court fails to explain why the absence of an exclusivity provision in the Veterans' Benefits Act forecloses suits by third parties in cases involving injuries to military personnel when the existence of such a clause does not bar similar actions when the injured employee works for one of the Government's civilian agencies.²²⁰

Before leaving Stencel, it should be noted that Stencel was a subcontractor who had no contractual agreement with the United States. If Stencel and the government had been parties to a contract, and the contract had contained an indemnity clause

protecting the contractor, duly authorized by federal statute, there is little question that Stencel would have been entitled to indemnity from the government despite the Feres doctrine. The scope of existing federal statutory law pertaining to indemnification of government contractors will be discussed under a separate heading below.

(2) Government Seeking Indemnity Or Contribution From Contractor

As expected, no cases were found where the government had been found liable to a third party on a products liability theory, and the government was seeking indemnification or contribution from a contractor. It is perhaps remotely possible that the government could be found liable to a third party under a products liability theory, but such an occurrence is very unlikely for two reasons. First, the Supreme Court has interpreted the permissible scope of United States liability under the Federal Tort Claims Act to be restricted to negligence actions²²¹. Secondly, the government rarely, if ever, "manufactures" a product solely through its own efforts, and government "sales" are distinguishable from private commercial sales where the primary motive is profit. In other words, the federal government is predominately a buyer and a user, rather than a manufacturer, seller, or supplier. Hence, the vulnerability of the federal government to direct products liability actions is not a major concern.

b. Non-Products Liability Cases

(1) Contractor Seeking Indemnity Or Contribution From Government

Non-products cases involving contractor indemnity or contribution claims against the United States are relatively rare. However, one unusual case, California-Pacific Utilities

Co. v. United States, a 1971 decision by the Court of Claims, merits close consideration. In California-Pacific Utilities the government had obtained a permit from the public utility company to use a right of way for military maneuvers. During maneuvers a soldier was severely injured when the antenna on a radio he was carrying came into contact with one of the public utility high tension electric lines. The soldier's suit against the public utility was settled prior to trial for \$350,000, an amount which the government agreed was reasonable.

The public utility then brought suit against the United States in the Court of Claims seeking to recover the settlement amount. Two grounds of recovery were asserted by the public utility. First, the public utility contended that the permit should be reformed to include a provision requiring the government to indemnify it for the settlement amount. Secondly, the public utility contended it was entitled to recovery on a breach of contract theory.

The Court of Claims indicated it had jurisdiction to reform a government contract as an incident to its issuance of a judgment for money, but the court concluded there was no basis for such reformation in this case. The court's refusal to reform the contract to include an indemnification provision was based on the following rationale: (1) the appropriation for the fiscal year involved in this case did not contain any express provision for reimbursement of damages such as those sustained by the public utility; (2) reforming the permit to include an indemnification provision would permit the public utility to recover for its own negligence in failing to properly maintain

its power lines and failing to mark those lines with any warning signs or devices; and (3) the public utility could not rely on the alleged oral indemnity representations of a government official who had apparent authority, but not actual authority, to bind the government.

The court's treatment of the breach of contract theory is most interesting. The court found that the public utility's failure to properly maintain its power line not only constituted negligence but also a breach of the maneuver permit. The government, however, waived this breach by continuing to perform under the permit after its own reconnaissance of the area served as notice of the breach by the public utility. Additionally, the government was found to be negligent in failing to specifically warn military personnel that high voltage power lines were in the maneuver area, and the government's failure to ensure that the soldier's radio antenna was tied down constituted a breach of the permit contract with the public utility.

The Court of Claims concluded that the soldier's injuries were caused jointly by the public utility's negligence and the government's breach and negligence. The court then reasoned that under federal law and the comparative negligence rationale of United States v. Seckinger, the public utility was not entitled to any recovery because the negligence of the public utility was equal to or greater than the negligence of the government. Seckinger was an important Supreme Court decision and will be discussed in detail below. The Court of Claims decision in the above case has received considerable criticism because it applied a modified 50% form of comparative negligence to two parties

whose concurrent negligence had caused the soldier's injuries, whereas the modified 50% form of comparative negligence has classically been applied in situations where the party suing is the person who was injured. Seckinger did not apply a modified 50% form of comparative negligence.

(2) Government Seeking Indemnity Or Contribution From Contractor

The government has been quite active in pursuing indemnity claims against construction and service contractors. The cases show that the government has pursued these indemnity claims because of specific contractual language, and because of the nature of the work performed under these types of contracts.

The leading case in this category is United States v. Seckinger.²²³ In Seckinger, an employee of M. O. Seckinger Company, a government contractor, was injured while installing steam pipes at the Paris Island Marine Depot in South Carolina. After receiving workmen's compensation benefits from Seckinger, the employee sued the United States under the Federal Tort Claims Act. The United States sought to implead Seckinger as a joint tortfeasor, but the trial court dismissed the third-party complaint without prejudice. The employee was awarded \$45,000 in the ensuing trial. The United States paid the judgment and sued Seckinger, seeking indemnification based on a contract clause (similar to the "Permits and Responsibilities" clause in Standard Form 23-A, government construction contracts) which provided that Seckinger would be liable for "all damages to persons or property that occurred as a result of its fault or negligence in connection with the prosecution of the work." The trial court dismissed the complaint concluding that:

(1) the suit was barred by res judicata; and (2) the responsibility clause could not be construed to allow indemnification for the indemnitee's own negligence.²²⁴ On appeal, the Fifth Circuit rejected the trial court's res judicata reasoning, but agreed with the trial court's indemnification rationale. Noting that federal law controls the interpretation of contracts to which the United States is a party, the court adopted, as the federal rule, the "majority rule" that intent to indemnify for the indemnitee's own negligence must be clear and unequivocal. Finding no such clear and unequivocal expression of intent, the Fifth Circuit concluded that no indemnification could be required.²²⁵ The Supreme Court granted certiorari and reversed, concluding that the responsibility clause calls for indemnity on the basis of comparative negligence. Therefore, the United States was entitled to recover from the contractor that portion of the damages caused by the contractor's negligence.²²⁶ The majority stated that such a holding was appropriate because: (1) the interpretation was consistent with the plain language of the clause;²²⁷ (2) the clear-intent rule would be preserved intact, as each party would be held responsible for the damages caused by its own negligence; and (3) the interpretation was the least favorable to the government, considering all reasonable and practical constructions, and thus followed the maxim that a contract should be most strongly construed against the drafter. In effect, the majority agreed with the government's argument that denial of indemnity would deprive the clause of any sensible meaning, and agreed that the clause could only reasonably be construed to require either full or partial indemnity. Three

Justices dissented on the ground that the foregoing interpretation of the clause was both unconscionable and inaccurate. They emphasized that the contractor had every reason to expect that his liability for employee injuries would be limited to that imposed by state workmen's compensation statutes when he entered into the contract.

It is worthwhile to pause at this point and compare Seckinger with Stencel, both decided by the United States Supreme Court. As discussed above, the Court rejected Stencel's indemnity claim against the United States based upon the Feres doctrine and the "upper limit" liability of the United States pursuant to the Veterans' Benefits Act. In contrast, however, the same Court allowed the partial indemnity claim of the United States against the contractor involved in Seckinger, despite the presumed "upper limit" liability of the contractor under state worker's compensation laws. Significantly, Seckinger was not even mentioned in the Stencel opinion. The United States appears to be "having its cake and eating it too."

The Seckinger holding has been construed in at least two federal court decisions. In Larive v. United States,²²⁸ a contractor employee was severely injured during performance of a government electrical facilities construction contract. The employee was accidentally injured when he came in contact with a live electrical conductor. The employee filed suit against the government under the Federal Tort Claims Act and obtained a settlement of \$301,000. The government thereafter brought suit against the contractor contending the contractor was obligated to indemnify it under the contract provision similar to the standard "Permits and Respon-

sibilities" clause. The trial court found that the contractor and the government were each 50% at fault in causing the employee's injuries. The Court of Appeals for the Eighth Circuit affirmed the trial court judgment awarding the government half of the amount of the settlement which the government had reached with the employee. The Eighth Circuit specifically referred to the Supreme Court Seckinger comparative negligence ruling, and obviously opted for a "pure" comparative negligence standard rather than the modified 49% form of comparative negligence applied by the Court of Claims in California-Pacific Utilities Co. v. United States.²²⁹

The Seckinger holding was also construed in Jumper v. United States,²³⁰ a 1975 ruling by a federal district court sitting in California. In that case an injured contractor employee sought to recover damages from the United States under the Federal Tort Claims Act. The United States, in turn, contended the contractor was bound to indemnify it for any amount the court found the United States was obligated to pay the employee. The contention of the United States was based upon the familiar language of the "Permits and Responsibilities" clause making the contractor responsible for all damages to persons that occur as a result of his fault or negligence. The contractor moved that the government's indemnity claim be dismissed based upon allegedly applicable state law, but the district court denied the dismissal²³¹ motion based upon the Seckinger holding.

Government indemnity claims against construction and service contractors may also be based on warranties of workmanlike service. Two fairly recent cases illustrate this theory of recovery by the government. The first case, United States v.

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McDonnell Douglas Corp., is a 1970 decision by a federal district court sitting in California, and the second case, United States v. San Francisco Elevator Co.,²³³ is a 1975 decision by the Ninth Circuit Court of Appeals.

In McDonnell Douglas, one of the contractor's employees was fatally injured during the performance of a contract to construct a rocket engine for the government. The employee's heirs filed suit against the government under the Federal Tort Claims Act, and the government filed a third-party indemnity claim against the contractor. Even though the contract did not contain an express indemnity clause, the court nevertheless found that a contract claim was involved, based upon the parties contractual relationship, and that federal law rather than state law would govern the outcome of the government's indemnity claim. The court went on to compare the facts of the case with Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,²³⁴ where the Supreme Court stated the contractor's safe performance was inherent in the contract, and this warranty of workmanlike service was comparable to a manufacturer's warranty of the soundness of his manufactured product. Finding the facts of the two cases strikingly similar, the court in McDonnell Douglas found the contractor liable for²³⁵ the full amount of the indemnity claim.

In the other case, San Francisco Elevator, an employee of an elevator repair subcontractor was killed during performance of the prime contract to repair a government ship. The Ninth Circuit held that the government could recover the full \$470,000 indemnity claim from the subcontractor because the subcontractor impliedly warranted that it would accomplish its task in a

workmanlike manner and breached that warranty by negligently performing the repair. Surprisingly, the Ninth Circuit allowed the full \$370,000 indemnity claim, plus the reasonable attorneys' fees incurred by the government in defending itself, despite the fact that the contract between the government and the prime contractor contained an express clause limiting the prime's indemnity liability to \$300,000. But even more amazing, the Ninth Circuit allowed the full \$370,000 indemnity claim despite the trial court holding that the employee's death was caused by the negligence of both the subcontractor and the government. The Court of Appeals reasoned that the government's concurrent negligence does not bar it from recovering for the subcontractor's breach of the warranty of workmanlike performance, as long as that negligence did not prevent the subcontractor from doing a workmanlike job. It is difficult to imagine a case more deserving of comparative responsibility treatment. Clearly, equitable concepts of indemnity and contribution were not applied here.

C. Consequential Damages Relating to Defective Supplies Under Government Contract Law

The defective supplies consequential damages issue was brought to the forefront by Australia v. Lockheed Aircraft Corp.,²³⁶ a 1969 case which precipitated a full-scale investigation into the product liability area by the Department of Defense. The background facts of the case involved an aircraft accident that allegedly occurred because of a defective landing gear, a component which had been supplied by a subcontractor. The aircraft, an anti-submarine patrol P-3E, had been purchased by the United States Navy from Lockheed, and had, in turn, been resold to Australia. In April of 1968, during flight training of

Australian Air Force personnel, the alleged failure of the landing gear, manufactured by Menasco, caused the aircraft to crash and burn on landing. The aircraft was a total loss, but no lives were lost and there was no other damage. In August of 1969, the Australian Government sued Lockheed and Menasco for damages in the amount of \$4 million against Lockheed and \$5 million against Menasco. In its complaint, Australia asserted four theories of recovery: (1) the defective nature of the product; (2) negligence; (3) breach of warranty of merchantability; and (4) breach of warranty of fitness. The money claimed covered the cost of replacing the airplane, value of the equipment aboard, maintenance and operating costs, and loss of use of the aircraft. Moreover, exemplary damages were sought for gross recklessness and gross disregard for the safety of the aircraft and its crew. Needless to say, the government contract community was "shocked" at the prospect of tort liability of this magnitude. Prior to this incident, the vast majority of contractors had presumed their liability in similar circumstances would be limited to the value of the defective item itself (e.g., in this case, the defective landing gear). However, the issues were not litigated. An out-of-court settlement was reached: Menasco, Lockheed, and the United States contributed to the price of a replacement aircraft.

The matter was complicated by lack of agreement as to what "consequential damages" represented. The term has caused considerable confusion and both the courts and administrative boards of contract appeals have used varying definitions. Thus, it has been stated that, "the term consequential damages does not

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have a clear and precise meaning in the law." Some of the varied definitions of consequential damages are worthy of comment. Section 2-715 of the Uniform Commercial Code makes the seller liable for consequential damages which it defines as "(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented, and (b) injury to person or property proximately resulting from any breach of warranty." Another definition appeared in The Government Contractor:

When, for example, the failure of a brake system which a contractor furnished for use in an aircraft causes damage to the aircraft, such resulting damage to things other than the defective item itself is often referred to as "consequential" damage - as distinguished from what might be called "ordinary" damage (i.e., damage to the defective item itself).²³⁸

Undoubtedly, the broadest definition of consequential damages appeared in the 1972 Report of the Government Procurement Commission:

Consequential damages...relate to all other recoverable losses from use or loss of use of the defective item, such as complete loss or damage to end item or the system in which it is used, injury to the person or property of the purchaser or third persons, loss of use or rental value, and loss of business, production or profits by the purchaser.²³⁹

In the wake of Australia v. Lockheed, and confusion over the extent of contractor liability for defective products, the Department of Defense (DOD) promulgated new policy in Defense Procurement Circular (DPC) No. 86, dated 12 February 1971, which clarified potential contractor liability for consequential damages. Under the new policy, Armed Services Procurement Regulation (ASPR) 1-330 states that it is DOD's policy to

generally act as a self-insurer for loss or damage to government property occurring after final acceptance of supplies delivered to the government, with exceptions discussed below, resulting from any defects in those supplies. This policy, with certain conditions, is put into effect in ASPR 7-104.45 (a) (Limitation Of Liability For Defects). That clause makes the contractor liable for the value of a relatively low-dollar end item, but relieves the contractor of potential liability for consequential damages. A related clause, ASPR 7-104.45 (b) (Limitation Of Liability For Defects - Major Items), relieves the contractor from liability for loss or damage to the high-dollar end item itself, as well as from consequential damage liability. Contractors were extended further relief from potential liability by DPC No. 74-2, dated 4 October 1974, which included a negation, except for commercial items, of implied warranties of merchantability and fitness for a particular purpose when express warranties are used. The practitioner is cautioned that the above discussion of DPC and ASPR provisions highlights the more significant features of DOD's current policy regarding defective supplies and consequential damages, but the various provisions themselves must be studied to gain a full working knowledge of this important area of the law.

Certain other warnings must be made. The provisions discussed above relieve contractors of the specified potential liability regarding government owned property only. Liability for damage to property of third parties is not covered. Moreover, personal injury or death losses, either to the government or third parties, is not covered. One commentator discussed these

uncovered risks in the following manner:

With regard to a contractor's product liability risks for damage to the property of third parties and with respect to death or injuries to persons, the regulations of most agencies are comparable to the coverage by DOD in its Armed Services Procurement Regulations. In cost-reimbursement contracts, there is included a clause entitled, "Insurance-Liability to Third Persons", which requires contractors to maintain an adequate insurance program, since the Government agency will not assume the risk. In fixed-price contracts, while no mention of insurance is usually found, neither is there relief from third party liability, so that prudent contractors must take action to obtain appropriate coverage through insurance or some self-insurance program.²⁴⁰

D. Statutory Federal Contract Indemnification Policy

1. Indemnification Under Research and Development Contracts Against Unusually Hazardous Risks

Pursuant to the authority of 10 U.S.C. 2354, and when authorized by the appropriate agency Secretary, or his or her designee under 10 U.S.C. 2356, a contract for research or development, or both, may provide for indemnification of the contractor and subcontractors against: (1) claims by third persons, including employees, for death, bodily injury, or loss of or damage to property; and (2) loss of or damage to the contractor's property. Such indemnification applies to the extent that such liability, loss or damage results from a risk that the contract defines as unusually hazardous, arises out of the direct performance of the contract, and is not compensated by insurance or otherwise. When properly authorized, an indemnification clause under 10 U.S.C. 2354 is required to clearly define the specific unusually hazardous risks to which the clause applies. One or more risks under a contract may appropriately be defined as unusually hazardous, if they are in fact unusually hazardous in nature. Moreover, the designation of one or more risks as

unusually hazardous does not necessarily preclude indemnification²⁴¹ of other risks under separate statutory authority.

2. Indemnification Under Public Law 85-804

Public Law 85-804 (50 U.S.C. 1431-35) constitutes a broad grant of authority to the President enabling him to authorize any agency of the government to enter into contracts or amendments, without regard to other provisions of law relating to contracts, whenever he deems such action would facilitate the national defense. The Act sometimes enables contractors to obtain equitable relief under contracts with the government, even under circumstances where no strictly legal right to such relief exists. Whether or not such requested relief is granted rests within the sole discretion of the appropriate procurement agency. Applications for relief under Public Law 85-804 are generally referred to the appropriate Army, Navy or Air Force Contract Adjustment Board within the Department of Defense. Although these Board decisions are not published, they do grant substantial monetary relief to contractors under widely varying circumstances. The general subject of extraordinary relief under Public Law 85-804²⁴² has been reviewed elsewhere, and will not be discussed further here. However, the indemnification provisions of Public Law 85-804 do merit further consideration.

Pursuant to Public Law 85-804 and Executive Order 10789, as amended, appropriate clauses may be used to provide for the indemnification of contractors and subcontractors against unusually hazardous or nuclear risks. Each contract containing an authorized indemnification clause under this law must clearly define the specific risk or risks to which the clause applies.

Executive Order 11789, dated November 14, 1958, limited relief under Public Law 85-804 to "the amounts appropriated and the contract authorization provided therefore...." This limitation created doubt about the validity of indemnity provisions, but the doubt was removed when President Nixon issued Executive Order ²⁴³ 11610, dated July 22, 1971, which amended Executive Order 10789 to state that the above language limiting relief to appropriated amounts will not apply to unusually hazardous or nuclear risk indemnification provisions. Defense Procurement Circular (DPC) No. 103, dated 24 August 1972, revised applicable ASPR provisions to remove the appropriation ceiling and to otherwise implement Executive Order 11610 within the Department of Defense. Two of the more important DPC No. 103 provisions enable subcontractors to obtain the same indemnity protection as prime contractors, and permit the government to require the contractor to purchase and maintain financial protection from private sources before an indemnification clause is included in the contract. Additionally, DPC no. 103 provides that indemnification authority may be exercised only by the Secretary ²⁴⁴ of each military department within the Department of Defense.

3. Proposed Changes to Indemnification Legislation

The Office of Federal Procurement Policy is considering a proposed "Contract Indemnification Authorization Act" which would affect both statutes discussed above if enacted by Congress. The new Act would provide general authority to indemnify government contractors against three types of liability, loss, or damage. The first type is liability to third parties, including employees of the contractor, for death, bodily harm,

or loss of or damage to property. The second type is liability for loss of or damage to property of the contractor. The third type is liability to the United States for loss of or damage to property of the United States, or because of liability of the United States to third parties, including government employees or other personnel, such as military personnel of the United States. Significantly, the contractor would be relieved of any liability for payments made by the United States under the Federal Tort Claims Act, the Federal Employee's Compensation Act, and similar laws. The intent of the new Act would be to provide protection against risks generally characterized as product liability risks. Such liability would continue to be determined under existing law.

Subcontractors, as well as prime contractors, could receive indemnification protection under the proposed Act. Of major importance, the contractor or subcontractor would be required to assume the risk of the first \$60,000,000 of liability, loss, or damage, or such higher amount of insurance or self-insurance as the contractor actually carries. However, in exceptional cases provision could be made for reduction of the \$60,000,000 amount with the approval of the Administrator for Federal Procurement Policy. The \$60,000,000 figure was derived from the Price-Anderson Act, which will be discussed in the next chapter.

Prior specific approval of the agency head or assistant agency head would be required before indemnification could be provided. The proposed Act would authorize interim payments to claimants, up to a \$25,000 maximum, and relief could also

be made available under the Disaster Relief Act.

The effect of the proposed Act on existing indemnification statutes is extremely important. The specific indemnification provisions of the Price-Anderson Act under 41 U.S.C. 2210 would continue to be the only authority for indemnification of contractors within the scope of that Act, but indemnification of other nuclear contractors could be provided under the new Act. Similarly, specific legislation dealing with a particular program, such as the Swine Flu program, would not be affected by the proposed Act. The Department of Defense could continue to utilize P.L. 85-804 for indemnification purposes only in those instances where the proposed indemnification would not be within the scope of the new Act. Finally, the new Act would completely repeal 10 U.S.C. 2354 authorizing the military departments to indemnify research and development contractors against unusually hazardous risks.

Chapter III Footnotes

167. See Nelms v. Laird, 406 U.S. 797 (1972) (federal government held not liable under FTCA on absolute liability theory for alleged structural damage to home by flight of supersonic military aircraft); Dalehite v. United States, 346 U.S. 15 (1953) (initial Supreme Court decision establishing negligence, not absolute liability, as standard for government liability under FTCA).
168. See Chapters I and II supra for general discussion of products liability law.
169. 418 F.2d 1010 (5th Cir. 1969).
170. 340 U.S. 135 (1950) (The Feres doctrine generally precludes suits against the United States under the Federal Tort Claims Act by active duty servicemen who are injured incident to duty). But see Brooks v. United States, 337 U.S. 49 (1949) (two active duty servicemen, off the military installation and on leave status were struck and killed by a government vehicle on an interstate highway; the representatives of their estates were allowed to sue the United States under the Federal Tort Claims Act).
171. 339 U.S. 497 (1950).
172. Id. at 507.
173. 502 F.2d 867 (1974).
174. Id. at 875.
175. 512 F.2d 77 (1975), rev'd on other grounds, 423 U.S. 3 (1976) (Texas choice-of-law rules held applicable by Supreme Court).
176. 512 F.2d at 83. Accord, O'Keefe v. Boeing Co., 335 F. Supp. 1104 (S.D. N.Y. 1971); Boeing Co. v. Brown, 291 F.2d 310

(9th Cir. 1961). However, the O'Keefe court implied the manufacturer/contractor might be able to avoid strict liability based on defective design in some circumstances. The court stated:

There is no question, and the court so finds, that ultimate responsibility for the design and use of the B-52 bomber rests and always has rested with the United States government. The court concludes, however, that this fact, in itself, neither exonerates the defendant, nor has it in any way altered the defendant's duty as a manufacturer in this case where there has been no showing that the defendant was totally oblivious of and/or aloof from the genesis of the design specifications in the first place or that the specifications represented either something less than the uppermost level of the art or a compromise of safety. 335 F. Supp. at 11247.

- 177. 431 U.S. 666 (1977).
- 178. 536 F.2d 765 (1976).
- 179. 431 U.S. at 667.
- 180. 38 U.S.C. § 321 et seq. (made applicable to National Guardsmen by 32 U.S.C. § 318).
- 181. See note 170 supra, and accompanying text.
- 182. Cited supra note 178.
- 183. Cited supra note 177.
- 184. 431 U.S. at 676.
- 185. See generally Davis, Military Products Liability, 13 Trial 48 (July 1977); Note, Strict Liability and the Military Plaintiff, 22 Hastings L.J. 400 (1971); Note, Post-Acceptance Liability In Defense Supply Contracting, 56 Va. L. Rev. 923 (1970); Annot., 38 A.L.R.3d 1247 (1971).
- 186. See generally Dombrink, The Right to Collect Contribution Or Indemnity From The United States When A Federal Employee Or Serviceman Is Injured, 27 Jag. J. 69 (1972); S. Eizenstat &

- D. Love, Defendants' Dilemma In Federal Employee Actions: Impleader Of The United States, 38 Ins. Counsel J. 426 (1971).
187. See Franklin, Buildings and Building Materials, 28 Fed. Ins. Counsel 107 (1977).
188. See Baldwin, Products Liability As It Applies To Service Transactions, 43 J. Air. L. & Comm. 323 (1977).
189. See West v. Morrison-Knudsen Co., 451 F.2d 493 (9th Cir. 1971).
190. 464 F.2d 1141 (1972), cert. denied, 409 U.S. 1125 (1973).
191. 44 N.J. 70, 207 A.2d 314 (1965).
192. 207 A.2d at 325. The court concluded that in the particular situation presented, the plaintiffs could rely on principles of negligence, implied warranty or strict liability.
193. The term "turnkey" is normally used in association with housing projects where the contractor is responsible for specific design and construction work pursuant to general government needs.
194. 41 Am. Jur. 2d Indemnity § 1 (Supp. 1978).
195. General Electric Co. v. Cuban American Nickel Co., 396 F.2d 89 (5th Cir 1968).
196. Restatement of Restitution § 76 (1936).
197. Malloof v. United States, 242 F. Supp. 175 (1965), citing United States v. Allegheny County, 322 U.S. 174 (1944).
198. 304 U.S. 64 (1938).
199. See 41 Am. Jur. 2d Indemnity § 5 (Supp. 1978), and notes 12 and 13 contained therein.
200. See D. Oldham & W. Maynard, Indemnity And Contribution Between Strictly Liable And Negligent Defendants In Major Aircraft Litigation, 43 J. Air L. & Comm. 245, 246 (1977), for case citations where these various tests were applied.

201. Id. at 246. According to Professor Prosser, "it is extremely difficult to state any general rule as to when indemnity will be allowed and when it will not." W. Prosser, The Law of Torts § 50 at 309 (4th ed. 1971).
202. See, e.g., Price v. Shell Oil Co., 2 Cal. 3d 245, 257, 466 P.2d 722, 730, 85 Cal. Rptr. 178, 186 (1970).
203. 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).
204. 18 Am. Jur. 2d Contribution § 1 (Supp. 1978).
205. Id.
206. American Employers' Ins. Co. v. Maryland Casualty Co., 218 F.2d 335 (4th Cir. 1954).
207. Stradley v. Capital Transit Co., 87 F. Supp. 94 (D.D.C.), aff'd sub nom. Capital Transit Co. v. United States, 183 F.2d 825 (D.C. Cir.), rev'd on another ground sub nom. United States v. Yellow Cab Co., 340 U.S. 543 (1951).
208. 18 Am. Jur. 2d Contribution § 2 (Supp. 1978).
209. Id. at § 3.
210. Uniform Contribution Among Tortfeasors Act (1939).
211. Uniform Contribution Among Tortfeasors Act (revised 1955).
- 212.. For an excellent compilation of the various state contribution statutes, see D. Oldham & W. Maynard, Indemnity And Contribution Between Strictly Liable And Negligent Defendants In Major Aircraft Litigation, 43 J. Air L. & Comm. 245, 252 (1977), reprinted in 28 Fed. Ins. Counsel 139 (1978).
213. 431 U.S. 666 (1977), aff'g Donham v. United States, 536 F.2d 765 (1976).
214. 340 U.S. 135 (1950).
215. 536 F.2d 765 (1976).

216. See 431 U.S. 669 at n. 6.
217. 340 U.S. 543 (1951).
218. 431 U.S. at 668.
219. "The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependants, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute...."
220. 431 U.S. at 675-76.
221. See Nelms v. Laird, 406 U.S. 797 (1972); Dalehite v. United States, 346 U.S. 15 (1953).
222. 194 Ct. Cl. 703 (1971).
223. 397 U.S. 204 (1970).
224. See 408 F.2d 146, 148-49 (5th Cir. 1969).
225. 408 F.2d 146 (5th Cir. 1969).
226. 397 U.S. 204 (1970).
227. At the time Seckinger was decided U. S. Standard Form 23-A - the required form for government fixed price construction contracts - provided in article 10:

The contractor shall, without additional expense to the government, obtain all licenses and permits required for the prosecution of the work. He shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work..../Emphasis supplied/.

The pertinent language of U. S. Standard Form 23-A (Rev. 4-75) currently in use remains essentially unchanged.

228. 449 F.2d 150 (8th Cir. 1971).
229. See note 222 supra, and accompanying text.
230. 393 F. Supp. 172 (E.D. Cal. 1975).
231. Note that Jumper v. United States considers whether state or federal law applies in interpreting the provisions of a government prime contract. For a review of the subject of what law applies in interpreting a subcontract under a government prime contract, see Chemco, Inc., EBCA 4-2-75, 18 G.C. ¶ 148, and the accompanying Note.
232. 320 F. Supp. 673 (E.D. Cal. 1970).
233. 512 F.2d 23 (9th Cir. 1975).
234. 350 U.S. 124 (1956).
235. Some courts have interpreted the Ryan rule to be applicable only to admiralty cases. See, e.g., Smith Petroleum Serv., Inc. v. Monsanto Chemical Co., 420 F.2d 1103 (5th Cir. 1970). However, courts which have refused to limit Ryan to admiralty cases include McDonnell Douglas and General Electric Co. v. Moretz, 270 F.2d 780 (4th Cir. 1959).
236. The full cite of the case is The Commonwealth of Australia v. Lockheed Aircraft Corp. & Menasco Mfg. Co., No. 69-1623-WPG (C.D. Cal. Aug. 18, 1969) [hereafter called Australia v. Lockheed].
237. Appeal of Carteret Work Uniforms, ASBCA No. 1015 (1952).
238. 13 G.C. ¶ 80 (March 8, 1971).
239. Report, Gov't Procurement Comm., part H, ch. 2 91-2 (1972).

240. Rishe, The Product Liability Dilemma Under Government Sales,
34 U. Pitt. L. Rev. 177, 197 (1972).
241. In DOD Contracts, utilizing 10 U.S.C. 2354 indemnification
authority, ASPR 7-303.61 is designed for use in fixed price
R & D contracts, and ASPR 7-403.56 is designed for use in
cost-reimbursement R & D contracts.
242. See Doke, Extraordinary Relief Under P.L. 85-804, 66-3 The
Government Contractor Briefing Papers 171 (1966).
243. 36 Fed. Reg. 13755.
244. In DOD contracts utilizing Public Law 85-804 indemnification
authority, ASPR 7-303.62 is designed for use in fixed price
contracts, and ASPR 7-403.57 is designed for use in cost-
reimbursement contracts.

IV. EFFECT OF FEDERAL LEGISLATION - CATASTROPHIC ACCIDENT PROBLEM

The agencies of the federal government are actively engaged in a vast number of programs and contracts applying the latest scientific and technological developments. Few people outside of high government positions are aware of the exact nature of these numerous ongoing programs, and even fewer people understand or appreciate the attendant high risks of injury to persons or damage to property. Although remote, there is a chance that thousands of lives could be lost and billions of dollars in property damages might result from a single calamitous incident.²⁴⁵ While relatively minor accidents are reported routinely by the news media, considerable interest has also been generated about the possibility of major catastrophes associated with these programs.

Perhaps the greatest danger of potential catastrophes exists in national defense, space, and nuclear programs. The unintentional explosion of a nuclear device being carried by an airplane,²⁴⁶ the misfiring of a military or civilian missile or rocket,²⁴⁷ and the accidental release of poisonous or other hazardous substances are examples of catastrophic events which might arise from these types of government activities. Fortunately, none of these particular programs has resulted in a catastrophic accident to date, but the potential for such a calamitous accident nonetheless remains despite the best of human safety measures. Even the most careful and competent people sometimes make mistakes, and even the most carefully designed and manufactured products sometimes fail.²⁴⁸ The recent "swine flu" immunization program and the collapse of the Teton Dam - a reclamation project in Idaho by the Department of the Interior - are grim examples of unexpected²⁴⁹

catastrophes in government programs.

Existing federal statutory law pertaining to potential disasters in government programs will be examined in this chapter. Two important issues relevant to dangerous government programs need to be evaluated. First, does existing statutory law ensure adequate and timely personal injury and property loss protection to victims of such disasters? Secondly, does existing statutory law provide fair and adequate liability protection to contractors and other program participants?

A. Federal Tort Claims Act

²⁵⁰
The Federal Tort Claims Act (FTCA) was enacted by Congress in 1946 after nearly twenty years of debate. Prior to FTCA enactment, the doctrine of sovereign immunity precluded federal legal liability for personal injuries and property losses associated with government activities. The FTCA was enacted to overcome the Supreme Court's ruling in Cohens v. Virginia,²⁵¹ an early case enunciating the sovereign immunity doctrine. However, the FTCA did not constitute a full waiver of sovereign immunity; it only waived immunity for injury caused "by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place²⁵² where the act or omission occurred." (Emphasis supplied). Moreover, certain exceptions were made a part of the Act. The²⁵³ discretionary function exception has probably been the most frequently raised defense in FTCA litigation. Another exception excludes government tort liability involving combatant activities

of the armed forces during war.²⁵⁴ The FTCA is silent on the applicability of such tort concepts as absolute liability, strict liability and warranty. Exclusive jurisdiction lies in federal district courts,²⁵⁵ and the complaining party does not have a right to a jury trial.²⁵⁶ An administrative claim must be filed with the federal government as a prerequisite to a court action, and the government has six months to act on the claim before suit can be brought.²⁵⁷ Interest prior to judgment and punitive damages are not allowed,²⁵⁸ and the FTCA does not apply to claims arising in a foreign country.²⁵⁹ Since the Supreme Court's ruling in Feres v. United States,²⁶⁰ active duty members of the armed forces have generally been denied FTCA relief.

Unexpectedly, a catastrophic accident involving a government program occurred shortly after enactment of the FTCA. On April 16 and 17, 1947, two ships carrying fertilizer-grade ammonium nitrate under a government contract exploded at the docks in Texas City, Texas. The entire dock area was virtually destroyed. Personal injury and property damage losses were staggering. Statistics document 570 deaths, 3,500 injuries, and destruction or major damage to approximately 1000 homes, industrial plants and other buildings.²⁶¹ Appraisals of actual damages ranged from \$300 million to billions of dollars. The stage was set to test the adequacy of FTCA provisions in a disaster situation.

Six years after the disaster, the Supreme Court denied relief to the plaintiffs based upon the discretionary function exception of the FTCA. The case, Dalehite v. United States,²⁶² also contained "dicta" relating to the applicability of absolute

liability against the federal government under the FTCA:

There is yet to be disposed of some slight residue of theory of absolute liability without fault...We agreed...that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course arises irrespective of how the tort-feasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. /Emphasis supplied/.²⁶³

After the Supreme Court denied relief in Dalehite, Congress²⁶⁴ enacted the Texas City Disaster Relief Act in 1955, eight years after the disaster. The Army eventually paid \$17.1 million in settlement of claims under the limited settlement authority of the Relief Act, as amended, with the last payment²⁶⁵ being made in September 1962, fifteen years after the disaster. Needless to say, the FTCA did not serve as an appropriate mechanism to furnish adequate and timely relief to the victims of the catastrophe. In fact, the subsequent "too little - too late" effort of Congress relative to the Texas City disaster must candidly be viewed as a failure.

²⁶⁶
In 1972 the Supreme Court decided Nelms v. Laird, another important FTCA case having significant ramifications for claimants in potential future disasters. In Nelms the Court held, by a six-to-two margin, that a homeowner does not have a cause of action against the federal government based upon an absolute theory of liability under the FTCA, where the homeowner's house allegedly sustained major damage due to Air Force supersonic flight operations. The Nelms decision was based on the Court's reasoning in Dalehite.

Significantly, Nelms had unsuccessfully tried to obtain compensation under the Military Claims Act before pursuing ²⁶⁷ FTCA relief. The Military Claims Act provides relief for damage or loss of property or personal injury or death caused by government military or civilian personnel acting within the scope of their employment, or otherwise incident to military non-combat activities. The statutory limit of recovery was \$15,000 at the time Nelms filed his claim, but the limit has since been raised to \$25,000 per claim. The Military Claims Act covers such hazardous activities as aircraft and missile operations based upon an absolute liability concept of recovery. The claimant does not have to prove negligence under the statute; he simply has to prove a causal connection between the authorized noncombat activity and his injury or damage. Although payment of sonic boom property damage claims involving military aircraft has been fairly common, the Air Force investigating team concluded that the damage to Nelms' home was not ²⁶⁸ caused by a sonic boom. Since the Military Claims Act is an act of grace, conferring no legal rights, Nelms had no recourse other than pursuing FTCA relief after his claim under the Military Claims Act was denied. The eventual Nelms decision of ²⁶⁹ the Supreme Court, reversing the Fourth Circuit Court of Appeals, finally and conclusively ended all speculation that federal courts might allow FTCA recovery based upon an absolute liability theory.

B. Disaster Relief Act of 1974/Flood Disaster Protection Act of 1973

The Disaster Relief Act of ²⁷⁰ 1974 is the only federal statute in existence that offers broad, immediate assistance to victims of disasters in the United States.

"Major disaster" means any hurricane, tornado, storm flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of the United States²⁷¹/Emphasis supplied/.

Based upon a Governor's request, the President may declare that a major disaster exists, or that an emergency exists, and federal assistance is thereby made available to supplement state and local efforts.²⁷² Among the types of relief available are: temporary housing assistance, unemployment assistance, individual and family grant programs, food coupons, food commodities, relocation assistance, legal services, and emergency communications and transportation.²⁷³ The Act was not meant to compensate disaster victims for personal injury or property loss damages; it was the intent of Congress to provide an orderly and continuing means of assistance by the federal government to state and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters.²⁷⁴ Duplication of benefits is discouraged under the Act, particularly when a victim is covered by private insurance.²⁷⁵ If disaster victims are to receive full or adequate legal damages for their injuries or property losses, where the disaster was caused by government and private sector activities, such legal relief would have to be based on some law other than the Disaster Relief Act of 1974.

A related statute, the Flood Disaster Protection Act of 1973,²⁷⁶ was enacted to provide additional protection to victims of floods and mudslides. It enables persons living in floodprone areas to have both an opportunity to purchase flood insurance, with adequate limits of coverage,²⁷⁷ and requires the purchase of

flood insurance by property owners who are being assisted by
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federal mortgage loan programs.

C. Price Anderson Act

The stated dual purpose of the Price Anderson Act of 1957²⁷⁹ was "to protect the public and to encourage the development of
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the atomic energy industry." Private enterprises were understandably reluctant to commit themselves to commercial development of nuclear power for the generation of electricity without adequate financial protection. Sufficient private insurance simply was not available. Although different studies have reached different conclusions, they all clearly indicate that a nuclear accident could constitute the most devastating catastrophe imaginable in any of our government programs. For example, a 1957 report prepared at Brookhaven National Laboratory concluded that the meltdown of a reactor only about one-sixth the size of present commercial reactors (500 thermal megawatts versus about 3,000 thermal megawatts) could result in as many as 3,400 fatalities, and 43,000 radiation injuries with-
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in a year, and damage to property amounting to \$7 billion. A more recent report, the Nuclear Regulatory Commission (NRC) Reactor Safety Study released in October 1975, estimated the average consequence of the worst category of meltdown examined at 3,300 fatalities, 45,000 radiation injuries within one year, 45,000 delayed cancer fatalities, 240,000 delayed thyroid injuries, 5,100 inherited disorders in offspring of the irradiated popula-
282
tion, and damage to property amounting to \$14 billion. Government and industry officials characterize the likelihood of a major nuclear disaster as extremely remote, and fortunately there has

never been a reported nuclear accident; however, even a remote possibility of an accident of this magnitude is cause for great concern. If such a catastrophe were to occur, would the victims receive adequate compensation through our present legal system to pay them for their enormous losses? Admittedly, deaths and permanent personal injuries can never be the subject matter of "adequate" compensation: our legal system is only equipped to render compensation in monetary terms.

The Price Anderson Act compensation scheme is somewhat complex, involving three levels or sources of compensation should a nuclear accident occur. The first source is the financial protection, or liability insurance policy, maintained by each NRC licensee. The Act requires each large reactor to maintain the maximum amount of financial protection (liability insurance) available at reasonable cost and on reasonable terms from private sources.²⁸³ Present NRC regulations state that the maximum amount of liability insurance reasonably available is \$140 million per large reactor.²⁸⁴ The second source of funds, the retrospective rating plan, consists of deferred premium payments from the other large reactor participants in the plan. The Act specifies that each facility participating in the retrospective rating plan can be assessed a standard deferred premium of up to \$5 million following a nuclear incident. At present, this would make another \$310 million (\$5 million from each of 62 participants) available to compensate disaster victims in addition to the \$140 million of first level liability insurance funds. The third and final level of funds consists of indemnification agreements between licensees and the federal government (NRC), which

subjects the federal government to liability of up to \$500 million per nuclear incident. The federal government indemnity cannot exceed \$500 million reduced by the amount that the licensee's required financial protection exceeds \$60 million.²⁸⁵ Since the licensee of a large reactor is presently required to maintain \$140 million of primary level protection, and since the amount presently available through the retrospective rating plan is \$310 million, the federal government indemnity is now \$110 million²⁸⁶ for each large reactor incident.

The NRC also licenses federally owned elements of the fuel cycle, presently consisting of three uranium enrichment plants. These plants are operated by private firms under contract with the Department of Energy (formerly Energy Research and Development Administration), which is required to maintain an indemnification agreement with the NRC, but not financial protection.²⁸⁷

Licensees do not receive federal indemnification without charge. Under 1975 amendments to the Act, and 1977 NRC implementing regulations, each large reactor is annually required to pay \$36,000 to the federal government.²⁸⁸ The ultimate goal of the federal government is to relieve itself of the indemnity burden as soon as a sufficient number of licensees are participating in the retrospective rating plan. This will occur when there are 84 facilities participating in the plan. At that time the total financial protection for each licensee will be \$560 million, and the federal government indemnity will be zero. The total financial protection available will then continue to increase as the number of participating licensees increases above 84. At the present time there are 66 operating commercial reactors,²⁸⁹ with 90 under construction and 67 on order by utilities.

Congress is aware that a nuclear incident could easily exceed the \$560 million liability ceiling. The 1975 amendments to the Act direct Congress, in the event of a nuclear incident causing damage in excess of the applicable aggregate liability limit, to review the incident "thoroughly" and to act as "necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." This provision is especially noteworthy since a federal district court in North Carolina held that the liability ceiling of the Act violates the due process and equal protection clauses of the Constitution of the United States. However, the case, Carolina Environmental Study Group, Inc. v. AEC, was recently reversed by the United States Supreme Court.

The Price Anderson Act was amended in 1966 to authorize the NRC to require any licensee involved in an "extraordinary nuclear occurrence" to waive certain legal defenses. Licensees are required to waive defenses based on the conduct of the claimant or fault of persons indemnified, defenses based on charitable or governmental immunity, and defenses based on certain statutes of limitations. The waivers apply to claims covered by insurance policies, and to contracts providing financial protection and indemnification agreements. Defenses based on plaintiff's failure to take reasonable steps to mitigate damages or plaintiff's intentional and wrongful acts causing the nuclear incident are not waived; otherwise, the waivers essentially establish a system of no fault or absolute liability, but only up to the levels of liability of the respective three sources of funds. Congress enacted the waivers of defenses provisions

because Congress did not want to preempt state law with a federal tort standard. However, a plaintiff's burden of proof would still be great on causation and damages issues because of the complex nature of radiation injuries. Moreover, the possibility of nuclear incidents due to theft of radioactive materials or reactor sabotage would result in uncertain liability to plaintiffs. The Act authorizes, but does not require, the NRC and insurers to provide immediate emergency financial assistance to claimants following a nuclear incident, but any such interim relief is not part of a pre-planned administrative settlement procedure. Interim payments would not constitute an admission of liability of any party indemnified, and any payment would operate as a satisfaction to the extent made if a final settlement or judgment should later ensue.

D. Federal Government Contract Indemnity Statutes

Public Law 85-804 (50 U.S.C. 1431-35) and 10 U.S.C. 2354 are two of the most significant federal government contract indemnity statutes. They are discussed in the preceding chapter, along with a proposed "Contract Indemnification Authorization Act" currently being studied by the Office of Federal Procurement Policy.

E. Swine Flu Immunization Act

The Swine Flu Immunization Act of 1976²⁹⁷ represents a dramatic federal statutory shift in risk distribution in federal programs. The Act was passed by Congress in emergency session, at the urging of President Ford, after five hundred Army personnel at Fort Dix, New Jersey, became ill with a virus that resembled the virus involved in the swine flu pandemic of 1918-1919. That

pandemic left an estimated 548,000 Americans dead, and resulted
in worldwide fatalities totaling 20 million. All Congressional
opposition was overcome after one of the Army recruits died,
followed shortly thereafter by the mysterious "Legionnaires"
disease" in Philadelphia which left numerous deaths and confusion
concerning the cause of the disease.

The Swine Flu Act contains several unprecedented tort
liability provisions: (1) program participants are protected
against liability for other than their own negligence; (2) an
exclusive remedy for swine flu claimants is provided against the
United States; (3) the liability of the United States arising
out of the act or omission of a program participant may be based
on any legal principle that would govern an action against a
private individual under the law of the place where the act or
omission occurred, including negligence, strict liability in
tort, and breach of warranty; (4) the exceptions specified
in Section 2680 of Title 28, United States Code, shall not apply
(including discretionary function exception); and (5) provision
is made for substituting the United States as the party defendant
should a civil suit be brought against another program participant.
The term "program participant" is defined to mean the vaccine
manufacturers and distributors who participate in the program,
the public and private agencies or organizations that participate
in the program without charge for the vaccine or its administration,
and the medical and paramedical personnel who, without charge
for the vaccine or its administration, administer or assist in
administering inoculations with such vaccine. Finally, the United
States has the right to recover for that portion of the damages

awarded or paid under the Act, as well as any costs of litigation, attributable to any negligent conduct on the part of any program participant in carrying out any obligation or responsibility in connection with the program.³⁰⁵

The drug manufacturers and their insurance companies refused to participate in the mass immunization program without the protection offered by the Act. They were concerned about investigation and litigation costs, and about the warning requirement established in the Davis and Reyes decisions.³⁰⁶ Obviously, their primary concern was strict liability under Section 402A of the Restatement (Second) of Torts, not liability under negligence law. After the Act was passed the drug manufacturers obtained \$230 million of negligence liability insurance. The first \$10 million constitutes self-insurance and the remaining \$220 million of insurance was purchased for an \$8.65 million premium. Remarkably, the \$10 million self-insurance and the \$8.65 million premium, a total of \$18.65 million, was funded by the federal government because this cost was considered to be a vaccine production cost.³⁰⁷ Moreover, the federal government relieved the manufacturers of the responsibility of drafting informed consent forms,³⁰⁸ which may prove very costly for the federal government since no warning of possible paralysis was given. After numerous difficulties, the swine flu program was finally halted in December 1976 after the federal Center for Disease Control in Atlanta announced fifty-one cases of paralysis (Guillain-Barre syndrome), with four deaths, which had been reported from fourteen states.³⁰⁹ That was only the beginning. As of April 20, 1978, the Justice Department reported that 1,363 swine flu claims

had been filed against the federal government, with 402 claimants alleging that they contracted Guillaine-Barre paralysis as a result of the inoculations. Although damages claimed already exceed \$600 million, and are expected to exceed \$1 billion, only two claims totaling less than \$100 have been paid to date, and only 51 others have made their way into federal court so far.³¹⁰ Multidistrict litigation procedures have been invoked in the federal district court for the District of Columbia to handle discovery and other preliminary matters.³¹¹ Litigation under the Swine Flu Act can be expected to continue for a number of years.

F. Teton Dam Act

On June 5, 1976, the Teton Dam collapsed in Idaho, killing 11 persons, injuring more than 100 others and causing property damage in excess of \$500 million.³¹² The dam was constructed for the United States Bureau of Reclamation of the Department of Interior. Congressional response was unusually rapid. On September 7, 1976, the President signed into law a statute to provide financial relief to victims of the disaster.³¹³

The following provisions are among the more noteworthy features of the Act: (1) Congress intended to provide just compensation and expeditious consideration and settlement for the deaths, personal injuries and losses of property, without regard to proximate cause, resulting from the failure of the Teton Dam;³¹⁴ (2) administrative claims shall be asserted against the Secretary of the Interior and the law of the state of Idaho shall apply, except awards and settlements shall be limited to actual or compensatory damages and shall not include interest prior to settlement or punitive damages;³¹⁵ (3) the amount to be

awarded shall be reduced by the amount of insurance benefits (except life insurance benefits) or other payments or settlements previously paid; (4) upon the acceptance of any payment or settlement under the Act, the claimant shall assign to the United States any rights of action he has or may have against any other third party, including an insurer; and (5) the Secretary of the Interior is authorized to make advance or partial payments, and he is required to determine the amount of the award, if any, within twelve months of the date the claim is submitted.

In the determination and settlement of claims under the Act, the Secretary shall limit himself to the determination of:

- (1) whether the losses sustained directly resulted from the failure of the Teton Dam on June 5, 1976;
- (2) the amounts to be allowed and paid pursuant to this Act; and
- (3) the persons entitled to receive the same.

The language of this section clearly constitutes a no fault or absolute liability standard to be followed by the Secretary.

Section 9 of the Act sets out the procedure whereby a claimant may elect to file suit under the FTCA, or other applicable law, or continue to proceed with the claim under the Act:

Sec. 9 (a) An action shall not be instituted in any court of the United States upon a claim against the United States which is included in a claim submitted under this Act until the Secretary or his designee has made a final disposition of the pending claim. A pending claim may be withdrawn from consideration prior to final decision upon fifteen days written notice, and such withdrawal shall be deemed an abandonment of the claim for all purposes under this Act. After withdrawal of a claim or after the final decision of the Secretary or his designee on a claim under this Act, a claimant may elect to assert said claim or institute an action thereon against the United States in any court of competent jurisdiction under any other provision of applicable law, and upon such election there shall be no further consideration or proceedings on the claim under this Act.

(b) Any claimant aggrieved by a final decision of the Secretary under this Act may file within sixty days from the date of such decision with the United States District Court for the District of Idaho a petition praying that such decision be modified or set aside in whole or in part. The court shall hear such appeal on the record made before the Secretary. The filing of such an appeal shall constitute an election of remedies. The decision of the Secretary incorporating his findings of fact therein, if supported by substantial evidence on the record considered as a whole, shall be conclusive....³²⁰

Obviously, barring unusual circumstances, claimants would be well-advised to follow the absolute liability provisions of the Act rather than the FTCA negligence requirements. Apparently, there is no exclusive remedy against the United States as under the Swine Flu Act. A favorable feature of the Teton Dam Act is that its claims program is required to be coordinated with other disaster operations conducted by other federal agencies under the Disaster Relief Act of 1974.³²¹

G. Proposal For Standardized Statutory Relief

Catastrophic accidents in government programs have occurred under widely differing circumstances, and future catastrophes no doubt will be as different as they are unexpected. Many will argue, as advocates of the commercial nuclear industry have done in the past, that strict safety measures render the likelihood of the occurrence of a disaster so remote as to be almost negligible. Nonetheless, major disasters have occurred involving government programs in the past, including the Texas City disaster, the swine flu program, and the collapse of the Teton Dam in Idaho. It would be naive to presume that another disaster will never occur.

The intriguing question becomes one of whether or not standardized statutory relief can be enacted in advance of

catastrophes in government programs which will both protect the public and fairly shield program participants from ruinous liability. Have we learned anything from past disasters and statutes that will serve as a basis for a solution to the catastrophe liability problem? A standardized catastrophe statute, if enacted, could or should contain the following salient features:

- (1) The new statute could be triggered by a Presidential determination of a major disaster, other than a natural disaster, as set out in the Disaster Relief Act of 1974.
- (2) If the disaster involved a program of the federal government, the exclusive recourse of disaster victims would be a direct claim against the agency or department of the federal government involved (as under the Swine Flu Act), with an election of remedies option to proceed with the administrative claim through judicial review of the administrative record, or to proceed with FTCA relief (as under the Teton Dam Act).
- (3) The federal agency involved would be responsible for the administrative processing of the claim, including investigation and settlement responsibilities, and the determination of the amount of the awards, if any, would be made within one year from the date the claim was submitted (as under the Teton Dam Act).
- (4) The basis of liability under the statute, other than an FTCA remedy, would be absolute liability (causation in fact, damages, and a determination of persons entitled to receive the same). (As under the Teton Dam Act).
- (5) Interest prior to settlement and punitive damages would not be allowed. Otherwise, damages would be actual or compen-

satory damages, as determined under state law (as under FTCA and Teton Dam Act).

(6) Awards or settlements should be reduced by the amount of any private insurance available - except life insurance benefits (as under Teton Dam Act).

(7) Upon the acceptance of any payment or settlement under the statute, the claimant would assign to the United States any rights of action he or she may have against any other party, including contractors and his or her insurer (as under Teton Dam Act).

(8) There would be no right to a jury trial. Multidistrict litigation procedures would be followed (as under FTCA).

(9) The statute would provide for emergency advance or partial payments (as under Teton Dam Act).

(10) The statute would supplement, not replace, the Disaster Relief Act of 1974 (as under Teton Dam Act).

(11) A two year statute of limitations should apply to non-nuclear accidents, and a twenty year statute of limitations should apply to nuclear incidents (as in Teton Dam Act and Price Anderson Act).

(12) Provision should be made for substituting the United States as the party defendant should suit be brought against another program participant (as in Swine Flu Act).

(13) Provision should be made for replacing the United States as party defendant with any uncooperative program participant (as in Swine Flu Act).

(14) Insurance companies would be allowed to investigate the disaster along with federal officials, but federal officials

would be in charge of the investigation, and insurance investigators would not be allowed to hinder the investigation.

(15) Manufacturers, contractors, and other responsible program participants would be required to maintain the maximum amount of liability insurance available, under reasonable terms and at reasonable rates, and it would be the responsibility of the federal agency concerned to specify what amount of liability insurance is reasonably available (as under Price Anderson Act).

(16) The United States would have a legal right of recourse against manufacturers, contractors, and other responsible program participants up to the limit of the liability insurance reasonably available, as previously determined by the agency involved, and the right of recourse would be based on state law, including negligence, warranty, or strict products liability, if applicable, and the United States would have an unlimited right of recourse against any responsible non-program participant (different from Swine Flu Act where government right of recourse against program participants is limited to negligence grounds).

(17) The statute would not apply to the Price Anderson Act unless a nuclear disaster involved losses exceeding the \$560 million liability ceiling.

(18) The statute would not affect Public Law 85-804 or 10 U.S.C. 2354. However, government indemnification of program participants should only be utilized when liability insurance is not available in reasonable amounts, under reasonable terms, and at reasonable rates.

(19) If the President did not declare a major disaster, victims would still be able to seek relief through the normal tort-

litigation system, or through custom-tailored legislation enacted by Congress after-the-fact.

(20) The President should have the option of invoking the administrative relief features of the statute to victims of government program disasters who are located outside the United States. Judicial review of the administrative determination, or an FTCA remedy, would not be allowed. This Presidential option would not apply if the disaster occurred outside the United States and involved a United States ship powered by a nuclear reactor, or an incident outside the United States whereby personal injury or property damage is caused by space objects.

(21) There should be no limit to the amount of recovery under the new statute; however, Congress should have the option of amending the statute, after a major disaster has been declared, to limit the amount of total compensation available if the monetary loss associated with the catastrophe would be a staggering burden for even the federal government. If the total compensation available should be limited in this manner, funds should be appropriately allocated among victims, and a delayed injury fund should be established if necessary (as in Price Anderson Act).

(22) Distribution of tort liability losses and litigation costs among program participants, including the United States, should be made on the basis of comparative responsibility, regardless of whether such responsibility is based on state law of negligence, warranty, or Section 402A strict liability. Such tort loss distribution would only be determined after

initial catastrophe compensation had been concluded by the federal government based upon absolute liability standards. Tort loss distribution among program participants should be decided by a federal district court in a jurisdiction where the catastrophe occurred.

(23) The new statute could be called the Catastrophic Accident Compensation Act or the Major Disaster Compensation Act.

H. Summary

An examination of existing federal statutory law has revealed that the public is not adequately protected in the event of future catastrophic accidents in government programs. The Texas City disaster of 1947 left no doubt that the Federal Tort Claims Act (FTCA) cannot serve as a mechanism to compensate disaster victims for personal injuries and property losses. The discretionary function exception and the negligence standard of the FTCA are difficult, if not impossible, barriers for claimants to overcome in disaster situations. In Dalehite v. United States the Supreme Court denied relief to the Texas City disaster victims because of the discretionary function exception of the FTCA, and in Nelms v. Laird the Supreme Court conclusively held, by a six-to-two margin, that negligence rather than absolute liability was the FTCA standard to be applied against the federal government, even if the cause of action arises out of an ultra-hazardous government activity.

The Disaster Relief Act of 1974 is the only existing federal statute that assures disaster victims of emergency federal assistance, but that statute was not enacted to provide full or adequate compensation to disaster victims for their tort losses.

The Flood Disaster Protection Act of 1973 provides a needed opportunity for property owners to procure flood and mudslide insurance, but it applies to natural disasters rather than government program disasters.

The Price Anderson Act does not adequately protect the public in the event of a nuclear catastrophe because it is based on insurance and indemnity concepts, and does not provide a direct claim or cause of action against the federal government. Moreover, the \$560 million liability ceiling would be inadequate to compensate the public in many nuclear disaster situations. The Act allows interim payments to be made, but it does not require the licensees or their insurers to administratively process claims in a timely manner.

The primary federal statutes applicable to government contracts (Public Law 85-804 and 10 U.S.C. 2354) indemnify national defense and research and development contractors, but both of these statutes have the same basic disadvantages of the Price Anderson Act from a claimant's point-of-view. They make more money available to protect claimants and contractors, but they are not self-implementing. Moreover, they do not establish an administrative claim procedure, and they do not allow a direct claim against the United States.

The Swine Flu Act and the Teton Dam Act contain many innovative features that could protect disaster victims if included in a general statute applicable to government program disasters. The Swine Flu Act provides an exclusive, direct remedy against the federal government, and incorporates the government administrative claim procedures. Although it allows government recourse

against program participants, its basic flaw is that a program participant will only be liable in the unlikely event the government can prove negligence. Hence, insurers of the drug manufacturers are almost assured of windfall profits since the drug manufacturers cannot be found liable on Section 402A strict liability or warranty grounds. The Teton Dam Act is best suited to provide prompt and adequate compensation to disaster victims. The Act allows direct claims against the government based on a no fault or absolute liability standard. A timely administrative claim procedure is provided, and the FTCA and a government right of recourse against responsible parties are preserved.

From the point-of-view of a program participant (manufacturer, contractor, etc.) the Price Anderson Act provides full protection against potential ruinous liability. The indemnity provisions of Public Law 85-804 and 10 U.S.C. 2354 provide full or additional liability protection, but government officials are not required to include the indemnity provisions of the statutes in government contracts.

The Swine Flu Act fully protects program participants, except for their negligence, and probably will result in large profits to insurance companies at government expense. The government should not pay for insurance when the primary risks involved are not covered by the insurance policies, e.g., potential liability under strict products liability or warranty grounds. In those instances where the insurance industry cannot or will not provide real insurance coverage, on reasonable terms and at reasonable rates, the government should act as a self-insurer for the program.

The Teton Dam Act does not discuss the possible liability of contractors who constructed the dam, or the possible liability of other private concerns that may be liable to members of the public or the government. Therefore, the Teton Dam Act does not appear to affect program participant liability.

A comprehensive, standardized federal statute could provide increased protection to the public and program participants. Indemnity statutes are no more than a partial solution to the problem, even if they are implemented by government officials. A new major disaster compensation statute should provide claimants a direct and exclusive absolute liability remedy against the federal government, which would give the federal government a right of recourse against program participants based on applicable state law. Tort loss distribution among the federal government and program participants should be based on a comparative responsibility concept. The federal government could be held accountable on negligence or absolute liability grounds, and program participants could be held accountable on negligence, warranty or Section 402A strict liability grounds. A federal court could determine the respective liability of each party on a pure percentage basis. However, in disaster situations, program participants could only be held liable up to the level of liability insurance that the government department or agency had previously determined was reasonably available.

The law and experience have evolved to the point that Congress could enact a comprehensive disaster statute that would protect both the public and program participants, and at the same time promote uniformity and certainty in the law. Existing statutes

do not have to be disturbed. The insurance industry would continue to have a role to play. All parties would be held accountable. The alternative to enacting a comprehensive, standardized statute is to wait for another disaster to occur, and then attempt to enact another ad hoc statute under emergency conditions. Although Congress should have the option of enacting particular statutes for particular government programs, or in response to particular disaster situations, it is difficult to argue against enactment of a standardized statute prior to the occurrence of future disasters. If necessary, Congress could amend or supersede the standardized catastrophic accident statute in response to a particular situation.

Chapter IV Footnotes

245. Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York, Protection Against Catastrophic Accidents in Connection With Government Activities, in Hearings on H.R. 474 Before a Subcommittee of the House Committee on Government Operations, 91st Cong., 1st Sess., part 8, appendix 19, at 2332 (1969). See also A. Rosenthal, H. Korn, & S. Lubman, Catastrophic Accidents In Government Programs (1963). Reprinted in Hearings Before a Subcommittee on Government Operations, House of Representatives, 91st Cong., 1st Sess. (1969).
246. Nine accidents involving nuclear warheads or bombs have been reported, although in no case has the bomb or warhead exploded. See N. Y. Times, June 8, 1960, p. 2, col. 3. In one incident, a B-52 bomber had to jettison a 24-megaton bomb over North Carolina. The bomb fell in a field without exploding. The Defense Department has adopted complex devices and strict rules to prevent the accidental arming or firing of nuclear weapons. In this case the 24-megaton warhead was equipped with six interlocking safety devices, all of which had to be triggered in sequence to explode the bomb. When Air Force experts rushed to the North Carolina farm to examine the weapon after the accident, they found that five of the six interlocks had been set off by the fall! Lapp, Kill and Overkill 127 (1962).
247. For example, a GAM-77 missile fired at the Eglin Missile Range with an intended southeasterly course traveled in a northerly direction. The destruct system failed. Maximum Damage Estimate for GAM-77 Operations 11 (1961). A Snark missile fired from Cape Canaveral headed south and disappeared

over the jungles of Brazil. Staff of H. R. Select Comm. On
Astronautics And Space Exploration, 85th Cong., 2d Sess.,
Survey Of Space Law 23 n. 108 (Comm. Print 1958).

248. Currently, there are 1,363 swine flu immunization claims pending against the United States seeking over \$600 million in damages. Wash Post, April 20, 1978, at A1, col.1.
249. On June 5, 1976, the U.S. Bureau of Reclamation's Teton Dam in Idaho collapsed, killing 11 persons, injuring more than 100 others and causing property damage in excess of \$500 million. 122 Cong. Rec. H8,940 (daily ed. Aug. 24, 1976) (remarks of Rep. Flowers).
250. 28 U.S.C. §§ 1346(b), 2671 et seq. (1976).
251. 19 U.S. (6 Wheat.) 264, 411 (1821).
252. 28 U.S.C. § 1346(b) (1976):
253. Id. § 2680(a).
254. Id. § 2680(j).
255. Id. § 1346(b).
256. Id. § 2402.
257. Id. § 2675(a).
258. Id. § 2674.
259. Id. § 2680(k).
260. 340 U.S. 135 (1950). See note 170 supra for explanation of Feres doctrine.
261. F. J. Hand, "The Texas City Disaster" in Hearings on H.R. 474, supra note 245, appendix 20, at 2337-40.
262. 346 U.S. 15 (1953).
263. Id. at 44-45.
264. Act of Aug. 12, 1955, Pub. L. No. 84-378, 69 Stat. 707.

265. F. J. Hand, "The Texas City Disaster" in Hearings on H.R. 474, supra note 261, at 234.
266. 406 U.S. 797 (1972).
267. 10 U.S.C. 2731-37. Implemented by Air Force Manual 112-1, Claims Manual, 1 December 1972.
268. Nelms v. Laird, 442 F.2d 1163 (4th Cir. 1971).
269. See Keenan, Absolute Liability Shattered By Sonic Boom, 16 Air Force L. Rev. 29 (1974) for excellent discussion of facts and law in Nelms' claim and eventual FTCA suit. See also Morrison, Absolute Liability Under The Federal Tort Claims Act, 1973 Mil. L. Rev. 53; Peck, Laird v. Nelms: A Call For Review and Revision Of The Federal Tort Claims Act, 48 Wash. L. Rev. 391 (1973).
270. 42 U.S.C. §§ 3231-36, 5121-5702 (Supp. V 1975).
271. Id. § 5122(a).
272. Id. § 5141.
273. Id. §§ 5174-86.
274. Id. § 5121.
275. Id. § 5155.
276. 42 U.S.C. § 4013 et seq. (1973).
277. Id. § 4013(b)(1)(A).
278. Id. § 4014.
279. Price Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (current version at 42 U.S.C. §§ 2012(i), 2014(j), (k), (m), (p), (q), (t), (w), 2210 (1970 & Supp. V 1975).
280. 42 U.S.C. § 2012(i)(1970). See generally Note, Nuclear Power and the Price-Anderson Act: Promotion Over Public Protection, 30 Stan. L. Rev. 393 (1977).
281. AEC, Theoretical Possibilities And Consequences Of Major Accidents In Large Nuclear Power Plants, WASH-740 at 14 (1957).

282. NRC, Reactor Safety Study, WASH-1400 (NUREG-75/014), Main Report, at 83.
283. 42 U.S.C. § 2210(b) (Supp. V 1975).
284. 42 Fed. Reg. 20,140 (1977); 10 C.F.R. § 140.11 (1977).
285. 42 U.S.C. § 2210(c) (Supp. V 1975).
286. The licensee's total financial protection is \$450 million (\$140 million plus \$310 million), which exceeds \$60 million by \$390 million. Therefore, the federal government indemnity is \$500 million minus \$390 million, which equals \$110 million.
287. 10 C.F.R. §§ 140.51-.52 (1977).
288. 42 U.S.C. § 2210(f) (Supp. V 1975); 42 Fed. Reg. 46,49 (1977) (to be codified in 10 C.F.R. § 140.7(a)).
289. 28 Nuclear Info 4 (1977) (Atomic Industrial Forum, Inc.).
290. 42 U.S.C. § 2210(e) (Supp. V 1975).
291. Carolina Environmental Study Group, Inc. v. AEC, 431 F. Supp. 203 (W.D.N.C. 1977).
292. Id.
293. Duke Power Company v. Carolina Environmental Study Group, Inc., 46 U.S.L.W. 4845 (U.S. June 26, 1978) (Nos. 77-262 and 77-375).
294. The Act defines "extraordinary nuclear occurrence" to mean dispersal causing substantial radiation levels and substantial damages to persons or property offsite, as determined by the NRC, without a right of administrative or judicial review.
See 42 U.S.C. § 2014(j) (1970); 10 C.F.R. §§ 140.81-5 (1977).
295. 42 U.S.C. § 2210(n) (Supp. V 1975).
296. 42 U.S.C. § 2210(m) (Supp. V 1975).
297. Pub. L. No. 94-380, 90 Stat. 1113 (1976) (to be codified in 42 U.S.C. §§ 247(b) (j)-(1) (1976)).

298. 5 Med. Opinion 46 (Aug. 1976).
299. 42 U.S.C. § 247 (k)(1)(A)(i) (1976).
300. Id. § 247(k)(1)(A)(ii).
301. Id. § 247(k)(2)(A)(i).
302. Id. § 247(k)(2)(A)(ii).
303. Id. § 247(k)(5).
304. Id. § 247(k)(2)(B).
305. Id. § 247(k)(7).
306. Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968);
Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264 (5th Cir. 1974).
In Davis, the defendant manufacturer sold polio vaccine without warning of the statistical risk that one person in a million would contract polio by taking the vaccine. The manufacturer was held strictly liable under Section 402A. The Reyes court followed the rationale of the Davis case, even though polio vaccine was administered to an adult in Davis and an infant in Reyes.
307. U.S. Comptroller General, The Swine Flu Program: An Unprecedented Venture In Preventive Medicine, H.R. Doc. No. 77-115, 95th Cong., 1st Sess. 83, at 19-20 (1977).
308. Id. at 22-29.
309. N. Y. Times, Dec. 15, 1976, at B20, col. 3.
310. Wash. Post, Apr. 20, 1978, at A1, col. 1.
311. In Re Swine Flu Immunization Products Liability Litigation, Docket No. 330, Misc. No. 78-0040.
312. 122 Cong. Rec. H8,940 (daily ed. Aug. 24, 1976) (remarks by Rep. Flowers).
313. Pub. L. No. 94-400, 90 Stat. 1211 (1976).
314. Id. § 1.

- 315. Id. § 3.
- 316. Id. § 3(b).
- 317. Id. § 3(g).
- 318. Id. § 4(b),(c).
- 319. Id. § 4(a).
- 320. Id. § 9.
- 321. Id. § 6.
- 322. 42 U.S.C. § 2211 (1974) (provision for claims resulting from nuclear incident involving nuclear reactor of United States warship).
- 323. See Convention On International Liability For Damage Caused By Space Objects, TIAS 7762, 24 UST 2389 (1973).

V. CONCLUSION

Products liability law embraces the concepts of negligence, warranty, and strict liability in tort. Plaintiffs who have suffered personal injury or property losses may seek relief on one or more of these theories of recovery. When these theories of recovery are pleaded in the alternative, in the same suit, the trial of the issues normally becomes quite complex.

The most unusual tort feature of products liability law is that it focuses on the defective condition of a product, rather than the culpable conduct of manufacturers, sellers and suppliers in the distributive chain. This is a basic departure from traditional tort law where liability is based on the culpable conduct of tortfeasors.

There has been a virtual explosion in the products liability field during the past two decades. This "explosion" has centered around the rapid transition from products liability based on negligence concepts to liability based on strict liability in tort (strict products liability). Strict products liability is not the same as absolute liability. The basic issues involved in a strict products liability suit are causation, damages, and a requirement that the product be defective when it left defendant's control. In contrast, the basic absolute liability issues are limited to causation and damages.

There is general agreement among legal scholars and jurists that the present era of strict products liability in the United States began with Justice Roger J. Traynor's famous concurring opinion in Escola v. Coca Cola Bottling Company.³²⁴ Thereafter, in 1963, Justice Traynor conclusively completed the transition from

negligence to strict products liability in the landmark case of ³²⁵
Greenman v. Yuba Power Products, Inc. Two years later the
American Law Institute formulated Section 402A of the Restatement
(Second) of Torts, which has served as a dramatic impetus for
adoption of strict products liability in a clear majority of the
various American jurisdictions.

The "defective conditions" of strict products liability
actions have been grouped into three main categories: (1) manu-
facturing defects; (2) design defects; and (3) defective
warnings and directions. Cases involving manufacturing defects
generally involve construction flaws or production defects.
Design defect cases are normally complex and expensive. In
contrast, cases involving defective warnings and directions are
relatively simple and inexpensive. This is true because design
defect cases almost always involve expert witnesses, whereas
cases involving defective warnings and directions rarely require
expert witnesses for resolution.

One of the most controversial strict products liability
issues today is whether or not comparative negligence or compara-
tive fault concepts should be applied in strict liability cases.
A majority of the states have now adopted both strict products
liability and comparative negligence, either by judicial decision
or by legislative enactment. What is the relevance of plaintiff's
conduct (negligence or fault) in a strict products liability
case? There is a split of authority on this question, but a
majority of the courts that have been confronted with this issue
have decreased plaintiff's recovery in proportion to plaintiff's
negligence or fault in causing the harm.

Although the holdings of the majority in this regard appear sound as a matter of substantive law, they appear to be erroneous as a matter of form. Strict products liability is not based on negligence or fault; therefore, it is illogical to compare plaintiff's negligence or fault with defendant's liability based on the defective condition of a product. That is like comparing apples to oranges. The problem could best be resolved by enacting a comparative responsibility law, thereby enabling a judge or jury to compare defendant's responsibility for causing the harm, based upon negligence, warranty or strict products liability concepts, with plaintiff's responsibility for causing the accident based upon his or her culpable conduct. This approach would avoid semantic difficulties, achieve a fair result, and at least have the appearance of comparing oranges to oranges.

Products liability law is relevant to government contract law because contractors with the federal government are subject to state products liability laws. Under state law, contractors may be subject to third party personal injury or property damage claims on negligence, warranty or strict products liability theories of recovery. The federal government, in contrast, can only be subjected to third party personal injury or property damage liability on a negligence theory under the Federal Tort Claims Act.

The question arises as to whether or not ordinary citizens (third parties) are adequately protected under existing laws against the high risk of personal injury or property damage losses associated with government contracts and programs. Moreover, the question arises as to whether or not government contractors are

adequately protected under existing law against potentially ruinous third-party liability.

Ordinary citizens do not appear to be adequately protected where they suffer personal injury or property damage losses as a result of ultrahazardous or abnormally dangerous government activities. ³²⁶ Nelms v. Laird clearly established the principle that ordinary citizens can only recover against the federal government based upon negligence under the Federal Tort Claims Act, despite the fact that the harm may result from such ultrahazardous or abnormally dangerous activities as supersonic military flight operations. To correct this imbalance in the law, the Federal Tort Claims Act should be amended to permit ordinary citizen tort actions against the United States, based on an absolute liability theory of recovery under state law. Of course, ordinary citizens have the option of bringing suit against contractors under applicable state products liability law, or state absolute liability law where ultrahazardous or abnormally dangerous activities are involved.

Government program catastrophic accidents present complex tort risk distribution problems for the government and program participants. If ordinary citizens are to receive adequate tort loss protection against such disasters, they must be extended the legal right to bring a direct action against the federal government based upon an absolute liability theory of recovery. The government should then have a legal right of recourse against other program participants based upon applicable state law. The government and program participants should generally share third-party liability based upon pure comparative responsibility concepts.

unless they have contractually agreed to a different method of tort loss distribution.

Except where contract indemnity clauses are authorized by statute (e.g., 10 U.S.C. 2354 and Public Law 85-804), and approved for use in a particular contract by appropriate government officials, contractors are left unprotected against third-party tort liability unless they obtain adequate insurance coverage. The indemnity statutes are designed more for the protection of contractors than ordinary citizens; however, they would provide additional funds to satisfy judgments in the event contractor liability exceeded contractor insurance and assets. The proposed "Contract Indemnification Authorization Act" currently being studied by the Office of Federal Procurement Policy is really much more than a mere indemnification proposal. It appears to go much too far in protecting contractors against virtually every contemplated contract loss, so much so that contractors would have little or no incentive to guard against personal injury or property losses, to themselves or anyone else. Additionally, the proposed \$60 million indemnity threshold limit appears unrealistically high except for catastrophic accident situations.

Contractor vulnerability to state products liability laws has been clearly established by such cases as Foster v. Day & Zimmerman, Inc., ³²⁷ Barr v. Brezina Construction Co., ³²⁸ and Stencel Aero Engineering Corp. v. United States. ³²⁹ However, contractors have been unsuccessful in their efforts to shift such third-party tort losses to the federal government unless particular contracts have contained indemnity clauses authorized by federal statute.

In Stencel, the Supreme Court held that the contractor was precluded from obtaining indemnity from the federal government because of the Feres doctrine, and because the military pilot's pension under the Veterans' Benefits Act was considered to be the "upper limit" of liability for the government as to service-connected injuries. While the reasoning of Stencel appears correct, the result does not seem fair when compared with the Supreme Court holding in United States v. Seckinger.³³⁰ In Seckinger, the contractor was required to share tort liability with the federal government to an injured contractor employee on a comparative negligence basis, despite the contractor's presumed workmen's compensation "upper limit" of tort liability. This imbalance in the law needs to be resolved to place the government and contractors in a more equitable tort loss status.

To the maximum extent possible, comparative responsibility concepts should be applied to resolve this problem area, except in those cases covered by authorized indemnity contract clauses.

A similar problem exists in the private commercial sector. Manufacturers justifiably contend they do not receive fair treatment under the law when an employee injured on the job receives full worker's compensation benefits, yet is allowed to recover full products liability tort damages against the manufacturer of a defective product. Under present general law, the manufacturer is precluded from shifting any of the tort loss to the employer, even if the employer is at fault in contributing to the cause of the accident, because the employer is shielded by the immunity of worker's compensation laws. In a recent law review article, Professor John Wade urges that this inequity be resolved by

legislation requiring the employer to share part of the tort³³¹ loss based upon comparative fault principles. Perhaps a better solution would be to allow the manufacturer to implead the employer, or bring a separate suit against the employer, for the purpose of ascertaining the comparative responsibility of the employer, if any, in causing plaintiff's loss. The plaintiff's judgment against the manufacturer could then be reduced by the percentage of comparative responsibility attributable to the plaintiff and the employer. The net result would be that the liability of the employer would not exceed the worker's compensation limits; the manufacturer would only have to pay tort damages commensurate with its percentage of comparative responsibility; and the plaintiff would still be entitled to one full recovery against all responsible parties. The present system simply overcompensates employees covered by worker's compensation at the expense of products liability defendants. This same approach could be used to equitably distribute third-party tort losses between the government and contractors, thereby resolving the inequities of Stencel and Seckinger.

Finally, there is a real need for a federal contribution statute. Many of the indemnity cases discussed in this thesis were really contribution cases in principle. At least one federal court has recognized the need for application of a federal contribution and indemnity rule in cases having a³³² pervasive federal interest. The state contribution statutes are far from uniform. Cases involving the federal government and contractors would be more equitably resolved if the contribution³³³ features of the Uniform Comparative Fault Act were followed.

However, this author prefers application of comparative responsibility principles, as opposed to comparative fault or comparative negligence principles. Comparative responsibility could be based on negligence, other culpable fault, or on warranty, strict products liability or absolute liability, depending on what theory applies to what party. The ejection seat in Stencel could have plunged into a civilian's house. If so, the federal government could have been liable to the injured civilian under a negligence theory, and the contractor could have been liable to the injured civilian under a negligence, warranty or strict products liability theory. If and when that type of case reaches the courts, the respective tort risk distribution allocable to the parties should be determined by applying a federal rule of contribution and indemnity on a pure comparative responsibility basis.

Chapter V Footnotes

- 324. 24 Cal. 2d 453, 150 P.2d 436 (1944).
- 325. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
- 326. 406 U.S. 797 (1972).
- 327. 502 F.2d 867 (1974) (hand grenade strict products liability theory).
- 328. 464 F.2d 1141 (1972), cert. denied, 409 U.S. 1125 (1973) (products liability suit against construction contractor based upon defective stairway).
- 329. 431 U.S. 666 (1977) (products liability suit by injured military pilot against manufacturer of defective aircraft ejection system).
- 330. 397 U.S. 204 (1970).
- 331. See Wade, Products Liability and Plaintiff's Fault - The Uniform Comparative Fault Act, 29 Mercer L. Rev. 373, 390 (1978).
- 332. See Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 405 (1974) (federal rule of contribution and indemnity applied to aircraft mid-air collision case on a comparative negligence basis - federal government was a party to the action under FTCA because of duties of air traffic controller employed by the Federal Aviation Administration).
- 333. The Uniform Comparative Fault Act was drafted by the National Conference of Commissioners on Uniform State Laws and approved and recommended by it for enactment in all the states, at its annual conference, Vail, Colorado, July 29 - August 5, 1977. The Act with comments is reproduced as an Appendix to 29 Mercer L. Rev. 373, 392 (1978).

APPENDIX

I. States Which Have Adopted Section 402A of the Restatement (Second) of Torts

Alabama: Casrell v. Altec Indus., Inc., 335 So. 2d 128, 130-33 (Ala. 1976); Atkins v. American Motors Corp., 335 So. 2d 134, 136-37 (Ala. 1976).

Arkansas: Ark. Stat. Ann. § 85-2-318.2 (Supp 1973) (based on Section 402A).

Arizona: O. S. Stapely Co. v. Miller, 103 Ariz. 556, 559-61, 447 P.2d 248, 251-53 (1968).

Colorado: Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Colo. App. 99, 106-12, 517 P.2d 406, 411-14 (1973).

Connecticut: Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 558-62, 227 A.2d 418, 422-24 (1967).

Florida: West v. Caterpillar Tractor Co., 336 So. 2d 80, 87 (Fla. 1976).

Hawaii: Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 74-75, 470 P.2d 240, 243 (1970).

Idaho: Shields v. Morton Chem. Co., 518 P.2d 857, 859 (Idaho 1973).

Illinois: Suvada v. White Motor Co., 32 Ill. 612, 618-22, 210 N.E.2d 182, 186-87 (1965).

Indiana: Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 50-55, 258 N.E.2d 652, 656-57 (1970).

Iowa: Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 684 (Iowa 1970).

Kentucky: Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441, 446-47 (Ky. 1966).

Louisiana: Weber v. Fidelity & Cas. Ins. Co. of N.Y., 259 La. 599, 602-03, 250 So. 2d 754, 755-56 (1971).

Maryland: Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976).

Mississippi: State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966).

Note: Appendix represents updated listing of authorities contained in 51 Temp. L.Q. 1, 38 (1978).

Missouri: Williams v. Ford Motor Co., 411 S.W.2d 443, 448 (Mo. Ct. App. 1966).

Montana: Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 512-13, 513 P.2d 268, 272-74 (1973).

New Hampshire: Elliott v. Lachance, 109 N.H. 481, 483-84, 256 A.2d 153, 155-56 (1969).

New Mexico: Stang v. Hertz Corp., 83 N.M. 730, 732-35, 497 P.2d 732, 734-37 (1972).

New York: Codling v. Paglia, 32 N.Y.2d 330, 336, 298 N.E.2d 622, 624, 345 N.Y.S.2d 461, 463 (1973).

North Dakota: Johnson v. American Motors Corp., 225 N.W.2d 57, 66 (N.D. 1974).

Oklahoma: Kirkland v. General Motors Corp., 521 P.2d 1353, 1357-67 (Okla. 1974).

Oregon: Heaton v. Ford Motor Co., 248 Or. 467, 470, 435 P.2d 806, 807-08 (1967).

Pennsylvania: Webb v. Zern, 422 Pa. 424, 426-27, 220 A.2d 853, 854 (1966). See also Berkebile v. Brantly Helicopter Co., 337 A.2d 893 (Pa. 1975).

Rhode Island: Ritter v. Narragansett Elec. Co., 109 R.I. 176, 181, 283 A.2d 255, 258 (1971).

South Dakota: Engberg v. Ford Motor Co., 87 S.D. 196, 205, 205 N.W.2d 104, 109 (1973).

Tennessee: Olney v. Beaman Bottling Co., 220 Tenn. 459, 462-63, 418 S.W.2d 430, 431-32 (1967).

Texas: McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 788-89 (Tex. 1967).

Vermont: Zaleskie v. Joyce, 133 Vt. 150, 155, 333 A.2d 110, 114 (1975).

Washington: Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 531-32, 452 P.2d 729, 734-35 (1969).

Wisconsin: Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55, 63 (1967) (equates Section 402A standard with negligence per se).

II. States Which Have Adopted A Doctrine Of Strict Liability in Tort Not Expressly Based on 402A

Alaska: Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244, 248 (Alas. 1969) (adopted the Greenman formulation of strict liability and rejected section 402A).

California: Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963) (decisional origin of strict products liability); Cronin v. J. B. E. Olson Corp., 8 Cal. 3d 121, 123, 501 P.2d 1153, 1155, 104 Cal. Rptr. 433, 435 (1972) (rejected the unreasonably dangerous provision of Section 402A).

Delaware: Martin v. Ryder Truck Rental, Inc., 353 A.2d 581, 584-86 (Del. 1976) (adopted the Greenman formulation of strict liability rather than Section 402A).

District of Columbia: Cotton v. McGuire Funeral Serv., Inc., 262 A.2d 807, 808 (D.C. 1969) (court imposed liability for injury caused by placing a defective product into the stream of commerce, but declined to adopt Section 402A or to distinguish between implied warranty and strict liability in tort).

Georgia: Center Chem. Co. v. Parzini, 234 Ga. 868, 870, 218 S.E.2d 580, 582 (1975) (state's manufacturer's products liability statute imposed strict liability in tort on manufacturers of defective products causing injury, but the statute was not interpreted as including the unreasonably dangerous provision of Section 402A and thus is similar to the Greenman formulation of strict liability).

Minnesota: McCormack v. Hanksraft Co., 278 Minn. 322, 337, 154 N.W.2d 488, 499 (1967) (adopted the Greenman formulation of strict liability).

Nebraska: Kohler v. Ford Motor Co., 187 Neb. 428, 435, 191 N.W.2d 601, 606 (1971) (adopted the Greenman formulation of strict liability rather than 402A).

Nevada: General Elec. Co. v. Bush, 88 Nev. 360, 364-65, 498 P.2d 366, 369 (1972) (in defining a doctrine of strict liability, the court alluded to Section 402A, but did not expressly adopt it).

New Jersey: Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 64-65, 207 A.2d 305, 311 (1965) (adopted the Greenman formulation of strict liability); Glass v. Ford Motor Co., 123 N.J. Super. 599, 601, 304 A.2d 562, 564 (1973) (rejected the unreasonably dangerous provision of 402A).

Ohio: Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 230, 218 N.E.2d 185, 188 (1966) (court recognized strict liability in tort and would impose liability if it were proven that the defective product was manufactured by the defendant, the defect existed at the time defendant sold the product, and the defect caused the plaintiff's injury, but it failed to distinguish between implied warranty and strict tort liability of either the Section 402A or Greenman variety).

III. States Which Have Indicated Acceptance of a Rule of Strict Liability in Tort Either in Dicta or by Federal Courts Applying State Law

Kansas: Paoletto v. Beech Aircraft Corp., 464 F.2d 976, 981 (10th Cir. 1972) (court applied strict liability law of Alaska, the state in which the tort occurred, but also stated that it would apply strict liability under Kansas law).

Michigan: Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 609, 182 N.W.2d 800, 804 (1970) (court mentioned "products liability" as a term preferable to "strict liability," because the latter connoted absolute liability).

Utah: Shuput v. Heublein Inc., 511 F.2d 1104, 1105 (10th Cir. 1975) (court observed that while the Utah Supreme Court had not specifically adopted a strict tort liability doctrine, such a doctrine would not be inconsistent with the trend established by that court, and ruled that the plaintiff presented sufficient evidence under his strict liability claim to send the case to the jury).

IV. States Which Have Neither Adopted Nor Rejected Strict Liability in Tort

North Carolina: Gore v. Georgia J. Ball, Inc., 10 N.C. App. 310, 314, 178 S.E.2d 237, 240 (1971).

South Carolina: Caskey v. Olympic Radio & Television, 343 F. Supp. 969, 977 (D.S.C. 1972).

Maine, Massachusetts, Virginia, West Virginia, Wyoming (Strict products liability status undetermined).

V. States Which Have Adopted Section 402A and Have Specifically Referred to Negligence Concepts

Alabama: Casrell v. Altec Indus., Inc., 335 So. 2d 128, 132 (Ala. 1976); Atkins v. American Motor Corp., 335 So. 2d 134, 141 (Ala. 1976) (court adopted Section 402A but insisted that the manufacturer's failure of his duty constituted negligence as a matter of law).

Colorado: Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Colo. App. 99, 113, 517 P.2d 406, 413 (1973) (court refused to entertain defendants' intervening cause argument because it was a negligence concept unwarranted in a strict liability analysis).

Florida: West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976) (although the court recognized that by adopting Section 402A it was not dealing with a traditional negligence doctrine, it equated a manufacturer's violation of its duty under strict liability with negligence per se

for the purpose of applying the defenses of contributory or comparative negligence in the proper cases).

Georgia: Center Chem. Co. v. Parzini, 234 Ga. 868, 869, 218 S.E.2d 580, 581 (1975) (under the state's statutory strict liability doctrine, negligence need not be proven).

Indiana: Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 52, 258 N.E.2d 652, 656 (1970) (while new concept of strict liability moves radically away from fault, negligence and strict liability are distinct and independent bases for a cause of action despite their similar policy justification - the protection of the consumer from physical harm caused by a product).

New York: Codling v. Paglia, 32 N.Y.2d 330, 343, 298 N.E.2d 622, 629, 345 N.Y.S.2d 461, 470 (1973) (contributory negligence was a defense to an action in strict liability).

Ohio: Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 229, 218 N.E.2d 185, 188 (1966) (proof of negligence is not required for recovery under breach of implied warranty).

Oklahoma: Kirkland v. General Motors Corp., 521 P.2d 1353, 1365 (Okla. 1974) (court emphasized the differences between strict tort liability and negligence, and stated that traditional negligence concepts should not be applied under the new doctrine of strict tort liability).